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REPORTS OF CASES

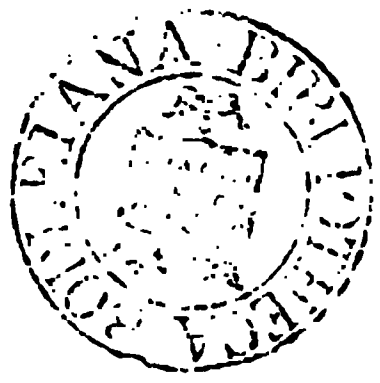
ARGUED AND RULED AT

NISI PRIUS,

IN THE COURTS OF

King's Bench, Common Pleas, & Exchequer;

TOGETHER WITH CASES TRIED ON



The Circuits,

AND IN

The Central Criminal Court:

FROM

EASTER TERM, 2 VICT., TO EASTER TERM, 4 VICT.

BY F. A. CARRINGTON & J. PAYNE, ESQRS.,

OF LINCOLN'S INN, BARRISTERS AT LAW.

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CASES

AT

NISI PRIUS.

COURT OF COMMON PLEAS.

Sittings at Westminster in Easter Term, 1839.

BEFORE MR. JUSTICE BOSANQUET.

1839.
May 29th.

WOODING *v.* OXLEY.

TRESPASS for assaulting the plaintiff, and causing him to be imprisoned without reasonable or probable cause, and to find bail to answer a false and unfounded charge.

Pleas—first, Not guilty; and second, that *the defendant was lawfully possessed* of and was in a certain room, or apartment, situate in Mare Street, Hackney, and being so possessed, and being in the said room, the plaintiff shortly before the time when &c., entered and came into the said room, or apartment, and then made *a great noise, disturbance, and affray*, and abused, insulted, and ill-treated the defendant and others, his friends, then also lawfully being in the said room, or apartment; and the plaintiff

Proof of annoyance and disturbance by a person present at a meeting, such as crying "hear, hear," and putting questions to a speaker, and making observations on his statements, will not justify the Chairman of the meeting in giving such person in charge to the police; but, to justify such a course of proceeding, it must be shewn that what was done amounted to a breach of the peace.

1839.

WOODING v. OXLEY.

then *greatly disturbed and disquieted* them in the peaceable and quiet possession of the said room, &c., *in breach of the peace* &c.; whereupon the defendant then requested him to cease his said noise and disturbance, and depart from the said room, &c., which he wholly refused to do, but continued there making the disturbance &c., whereupon the defendant, in defence of the said lawful possession &c., and to restore good order and tranquillity, gave the plaintiff in charge to one John Gulliver, a constable, for the said refusal to depart and *for the said breach of the peace,* and required the said J. G. to remove him from the room and take him into custody, to be dealt with according to law. It then averred that the said J. G. took the plaintiff to the station-house, and because it was late at night and an unreasonable hour to convey him before a justice, the constable necessarily detained him till he found bail to answer the said charge, and the defendant afterwards appeared before one William Grove, Esq., a justice, and charged the plaintiff with the breach of the peace, and disturbance aforesaid.—Replication, de injuriâ.

It appeared that the plaintiff, who was a master carpenter, on the evening of the 2nd of April, had been attending a meeting of a benefit society, which he left about 9 o'clock, and went to a meeting of a temperance society, at which the defendant was chairman. About 200 persons were present. There was contradictory evidence as to what part the plaintiff took in the proceedings. According to the testimony of his own witnesses, when a man who was addressing the meeting said, that, if a person drank water, his nerves would be as hard as iron, and he would be as strong as an elephant, the plaintiff merely said, "Yes, as a dead elephant," which created some laughter, and also made other observations which had the effect of interrupting the speaker and diverting the attention of the meeting from his speech. These witnesses (who were, like the plaintiff, members of the benefit society and came from it) stated, that the meeting was a public meeting, and that notice had been given of it by

the circulation of hand-bills; and they denied that the plaintiff assaulted any one, or created any disturbance, or committed any breach of the peace. One of them said there was no noise but the questions and answers, and any unpleasantness that arose was attributable to the intemperance of Mr. Oxley in leaving the chair, and going to the plaintiff and saying, that no person should put a question. One of the questions was, "what is to be done with the barley?" and the answer returned, "give it to the pigs; they fatten pigs with it in America." On the cross-examination of this witness, he was asked by *Bompas*, Serjeant, for the defendant, "Were you not at the temperance society a week before; and was there not then a disturbance?"

Storks, Serjt., for the plaintiff, objected to the question, as the plaintiff was not shewn to have been there at the time.

Bompas, Serjt.—It goes to the damages. I mean to contend that a number of persons went together from the benefit society to disturb the temperance meeting, and I think it important to shew, that the witness had been there a week before when there was a disturbance.

BOSANQUET, J.—My opinion is, that it is not evidence. I will take a note of it if you please. I think you must shew that the plaintiff was there.

A policeman stated, that he was fetched by Mr. Hunt, the secretary of the society, and that there was no disturbance when he got to the room; that the defendant met him in the yard, and asked why he was not there sooner? he replied, that he came as soon as he was sent for; that the defendant desired him to follow him into the room, which he did; that, when they got into the middle, the defendant pointed out the plaintiff and another person,

1839.

WOODING v. OXLEY.

and said, "These two gentlemen have been creating a disturbance the whole of the evening, and I give them in charge;" that he replied, "I have not heard or seen any thing which would justify me in taking them;" that the defendant said, "I insist on your taking them in custody;" that, after some further conversation, the defendant still insisting on their being taken, he (the witness) asked them to go to the station, and they consented; and when there, the defendant gave charge of them, and signed the sheet containing the charge, which was "making a disturbance at the temperance meeting room, Mare Street, Hackney." The witness further stated, that the case was heard by Mr. Grove, the magistrate at Worship Street, on the following day, and was dismissed by him.

The witnesses on the part of the defendant stated, that the meeting was not a public meeting, but only a meeting of the members and friends; that the plaintiff and another person, who was taken into custody with him, when a person was speaking, cried out, "It's a lie;" that they pushed the secretary about from one to the other several times, and created so much confusion that the speakers could not be heard.

Bompas, Serjt., for the purpose of proving that the room was the defendant's, proposed to ask a witness who it was that took it.

BOSANQUET, J.—Is it not admitted on the pleadings? The replication of de injuriâ admits the title.

W. H. Watson.—It is only alleged that the defendant was lawfully possessed, and de injuriâ puts that in issue. There is no seisin in fee alleged.

The witness stated, that Mr. Oxley had possession of the room, as the Temperance Society occupied under his sanction.

Storks, Serjt., for the plaintiff, contended that the conduct of the defendant was an unwarrantable interference with the liberty of the subject, and a serious annoyance and inconvenience to the plaintiff, which entitled him to damages. If it was not a public meeting, why were hand-bills circulated, and why were not inquiries made at the door previous to admission? The object of the meeting was evidently publicity, and the aim of the speakers applause; and the defendant had no right to give the plaintiff into custody because he differed in opinion with the speakers, and therefore contradicted some of their statements.

Bompas, Serjt., for the defendant.—The defendant was chairman, and what motive could he have for interfering if there was no disturbance? It is a curious fact, that so many of the benefit society's members should have gone to the temperance meeting. They do not affect to say, that they were friends of the cause. If a chairman of a meeting sees a set of men coming from a public-house to disturb the meeting, is he not justified in interfering to put down the disturbance? It is evident, from there being several of the club there, that there was an intention to put down the meeting. It appears that the expression, "it's a lie," was used, and, under those circumstances, whether the plea of justification is proved or not, you will say, I am sure, that no man who uses such language ought to have more than a farthing damages. It appears, also, that the secretary was hustled and assaulted. If a chairman is not to interfere under such circumstances, no meeting of any society could be conducted at all.

BOSANQUET, J., in summing up, after reading the words of the special plea, told the jury that, in his opinion, proof of annoyance and disturbance, such as crying "*hear, hear,*" and putting questions to the speaker, and making observations on his statements, would not be a sufficient

1839.

WOODING v. OXLEY.

justification of the defendant's conduct; but, in order to find a verdict for the defendant, they must be satisfied that what was done by the plaintiff amounted to a breach of the peace.

Verdict for the plaintiff—Damages, 5*l.*

Storks, Serjt., and *W. H. Watson*, for the plaintiff.

Bompas, Serjt., *R. Gurney*, and *Henry*, for the defendant.

[Attornies—*Masterman*, and *Dodd*.]

Sittings in London after Michaelmas Term, 1837.—Q. B. (*a*).

BEFORE LORD DENMAN, C. J.

Dec. 9th.

GREEN *v.* THE LONDON CEMETERY COMPANY.

A., himself a leaseholder of a house, entered into an agreement with B. to grant him an under-lease of the house for twenty years and a fraction, from Midsummer, 1836. B. entered into possession, and paid rent to A., and underlet a portion of the house to C. from Michaelmas, 1836, and received from C. the first quarter's rent, due at Christmas, 1836. On the 11th of January, 1837, B., wishing to part with his interest before the execution of the lease, wrote to A., requesting him to insert the name of D. instead of his. D., a few days after, sent to A. a written consent to become his tenant, on the same terms as B. had agreed to; and, in consequence, the lease was, on the 15th of March, 1837, granted by A. to D., instead of to B. D. brought an action for use and occupation against C., to whom B. had underlet a part of the house, and claimed the quarter's rent due at Lady-day, 1837:—*Held*, that he was entitled to recover.

THE declaration stated that the defendants were indebted to the plaintiff for the use and occupation of certain apartments. The plea was the general issue.

The action was brought to recover the sum of 25*l.*, being a quarter's rent due at Lady-Day, 1837, from the defendants, for apartments in a house No. 64, in Cornhill, which were occupied for the purposes of the Company. The case was tried chiefly upon admissions from which it appeared that in the month of June, 1836, a person named Steed entered into a written agreement with a person named

(*a*) Omitted ante, being in the New Trial Paper undecided.

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Lyon, who was the leaseholder under the Merchant Taylors' Company of the house No. 64, Cornhill, by which agreement Lyon agreed to let the house to Steed for twenty years and three-quarters, wanting six days, from Midsummer, 1836, at 300*l.* a year, and Lyon undertook to execute a lease to Steed according to the terms of the agreement. Under this agreement Steed entered into possession and paid rent to Lyon, and underlet a part of the house to the London Cemetery Company from Michaelmas, 1836, at the rent of 100*l.* a year, and received the first quarter's rent due at Christmas, 1836. On the 11th of January, 1837, Steed, being desirous of parting with his interest in the premises before the lease was executed to him, wrote to Lyon, stating that he had succeeded in obtaining a tenant for the premises in his stead. The letter was to this effect: "The gentleman is Richard Green, Esq., the ship-owner, of Blackwall, whose name you will be pleased to cause to be substituted for mine in the lease." On the 18th of January Mr. Green wrote to Mr. Lyon and consented to become tenant to him of the house on the same terms as Mr. Steed had agreed to; and in consequence of this arrangement the lease which was intended to have been granted to Mr. Steed, was granted by Mr. Lyon to Mr. Green. It was executed on the 15th of March, 1837.

Platt, for the plaintiff, contended in his opening, that the plaintiff was entitled to recover the quarter's rent from the defendants because they took under Steed, and were therefore estopped from disputing his interest in the reversion, and because Green acquired that interest from Steed before the rent became due which was sought to be recovered in the action.

In addition to the facts admitted as above, Steed was called as a witness for the plaintiff, and stated that he gave the Cemetery Company notice that he had agreed to part with his interest to Mr. Green. His evidence on the sub-

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ject was as follows:—" I gave a written notice some time in January, 1837, I think to the clerk, Mr. Buxton, in the back room in Cornhill, at their place of business; I cannot say whether I gave the notice before or after I wrote the letter to Lyon about Green; I gave it while the negotiation was going on between Lyon, Green, and myself, and before the transaction was complete; I might have given the notice to the managing director; I know it was received, because it was commented upon to me at the board by the chairman; I think this was in the month of January; it was when I applied for my rent up to Christmas; he said, 'We have a letter of yours; how are we to know whether you are the landlord or not? we have a letter stating that we are to consider Mr. Green as landlord;' they objected to pay the Christmas rent, and did not pay till I threatened to distrain for it."

Lord DENMAN, C. J.—I think you may give evidence of the contents of the notice.

Witness.—I told them in the notice that I had negotiated the letting of the house to Mr. Green. On his cross-examination by *Kelly*, he said—" I think the notice was given while it was matter of negotiation, and before it was completed."

Kelly.—" Have you not since given notice to the Company not to pay rent to Mr. Green?"

Platt objected.—The witness cannot get out of the written paper.

Kelly.—That is assuming the whole question. The other side rely on a notice; surely I am at liberty to shew that it was countermanded.

Platt.—If the written documents before your Lordship

operate as a surrender, then he cannot alter it by anything that he subsequently did or said.

Lord DENMAN, C. J.—I think it may possibly be material. It is but a notice. I think the question may be asked.

Witness.—I communicated to them that Mr. Green had not paid me the consideration for the transfer, but I never told them not to pay the rent to Mr. Green, nor not to consider themselves as Mr. Green's tenants.

Kelly, for the defendants.—Several questions of law arise in this case. It is said the defendants are estopped from denying Steed's title. I concur in that observation; but the question is, whether Steed's title has been vested in Green, the present plaintiff? I apprehend it has not. Steed came in under an agreement containing words of present demise. He was therefore the lessee of Lyon, a termor, and was himself a termor under Lyon, and entered into possession, and had a reversion to commence on the determination of the defendant's tenancy. The first question will be, was there any surrender by Steed to Lyon of the term or any part of it? I submit that there was not. If there was, then will come the question whether he could surrender that which he had granted to the defendants? Steed says in his letter that he has obtained a tenant—that may be a good license to Lyon to grant the lease to Green; but the question is, whether it is a surrender of Steed's interest? A surrender must take place eo instanti and cannot commence in futuro. Now this could only operate when the lease was granted, and therefore was not any surrender at all. At the time when the lease was granted nothing was done by Steed, but all was between Lyon and the present plaintiff. It appears that Steed had made the defendants his tenants, and had the

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reversion to commence on the determination of their tenancy—he had no present interest in the premises. He might, by a sufficient instrument, have surrendered what interest he had if it was to operate immediately. There is a further difficulty which is insuperable against this plaintiff's recovering. Supposing Steed did surrender at the time, the only effect would be to put Lyon in the same situation as Steed, and that was only a reversion—and as a reversioner, he would be entitled to the rent, but a lease subsequently granted would not pass the reversion.

Lord DENMAN, C. J., (to *Kelly*).—I think the question about the notice may be very material to your case; otherwise I should view the matter thus:—Lyon grants a lease to commence from Christmas, and the defendants become tenants to the plaintiff as the person to whom the lease was granted. I shall direct the jury to find for the plaintiff, and I will give you leave to move to enter a nonsuit or to have a special case.

Platt.—I do not understand your Lordship to recommend any particular course?

Lord DENMAN, C. J.—No; I do not feel much doubt about it. I do not know what the effect may be.

Platt then called the clerk of the Company, who swore that he had not received the notice spoken of by Mr. Steed, nor had he heard anything of it.

Lord DENMAN, C. J.—There really is no question about the notice unless the witness is perjured. He says he mentioned it to the Board, and the Chairman commented upon his letter. [His Lordship then said to the Jury]—In my opinion the plaintiff is entitled to recover. I think the defendants are tenants to him. You will therefore find

your verdict for him, and Mr. *Kelly* will bring it before the Court.

Verdict for the plaintiff—Damages, 25*l.*, subject, &c.

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Platt and *James* for the plaintiff.

Kelly for the defendants.

[Attornies—*James & G.*, and *Reeves.*]

A rule nisi was granted in the ensuing term pursuant to the leave given, which was called on for argument in Trinity Term, 1839, when, not being supported, it was, without argument,

Discharged.

CENTRAL CRIMINAL COURT.

JANUARY SESSION, 1839.

BEFORE MR. JUSTICE BOSANQUET, MR. JUSTICE PATTESON, AND MR. BARON GURNEY.

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January 2nd.

REGINA *v.* HANNON.

The 18th section of the stat. 11 Geo. 4 & 1 Will. 4, c. 66, applies to plates of promissory notes of persons carrying on the business of bankers in the province of Upper Canada.

THE first count of the indictment stated, that the prisoner, on the 14th September, in the 2nd year &c., at &c., feloniously, knowingly, and without lawful excuse, had in his custody and possession a certain copper plate, upon which was engraved a part of a certain promissory note for the payment of money, purporting to be a part of a promissory note of a certain company of persons carrying on the business of bankers in a certain country under the

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dominion of Her Majesty; that is to say, in the province of Upper Canada, in North America, under the name and style of the President, Directors, and Company of the Bank of Upper Canada, the said company of persons being other than the Bank of England, which said part of a promissory note is as follows:—

TEN TEN
10 X N X C Ten
Chartered by an act of Parliament.
The President, Directors, & Co.
of the Bank of Upper Canada
promise to pay ten dollars on demand
to the bearer for value received.—Toronto 18
Cashier President
X
TEN TEN

against the statute, and against the peace, &c.

The second and third counts were in the same terms, except that, in the former, the instrument was described as a promissory note for the payment of money "*of a certain body corporate;*" and in the latter, as a promissory note for the payment of money "of William Proudfoot, and others."

From the evidence, it appeared that the prisoner, within the jurisdiction of the Court, procured a copper plate to be engraved with the words and figures set out in the indictment, which are part of the form of the promissory notes used and circulated by the Bank of Upper Canada; that the plate so engraved was received by the prisoner, and taken into his possession under circumstances pregnant with suspicion; that it was obtained by him for a fraudulent purpose; that W. Proudfoot was the president, and J. G. Ridout the cashier of the Upper Canada Bank, the notes of which are usually signed by those persons; and that the prisoner had endeavoured to obtain from another engraver a fac-simile of their signatures, which he had cut

off from the Toronto note produced by him to the first engraver.

Prendergast, for the prisoner, contended, that the offence committed by the prisoner was not within the true intent and meaning of the 18th section of the 1 Will. 4, c. 66, upon which act only, he submitted, could the indictment, if sustainable at all, be supported. He argued, that that section does not extend to the notes of companies carrying on business within Her Majesty's dominions out of England, although the act done by the party indicted was clearly done within the jurisdiction of the Central Criminal Court. For the purpose of shewing that it could not be construed to extend to all notes wherever issued, he referred to section 19 of the same statute, which makes express provision respecting the possession of plates engraved with notes, or parts of notes, of persons resident in places not within her Majesty's dominions. He also adverted to section 3 and section 30 for the purpose of shewing that the general words of the former were deemed by the legislature insufficient to provide for the forging and uttering in England of notes made or purporting to be made out of England, since it was found necessary to introduce an express provision for that purpose in the latter.

BOSANQUET, J., who tried the case, left the questions of fact to the jury, who found the prisoner

Guilty.

His Lordship, with the assent of PATTESON, J., and GURNEY, B., who were present, respited the judgment, in order to take the opinion of all the Judges upon the objection raised.

Bodkin and *Doane*, for the prosecution.

Prendergast, for the prisoner.

[Attornies—*Bush & M.*, and *Pile.*]

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Hilary Term, 1839.

BEFORE LORD DENMAN, C. J.; TINDAL, C. J.; LORD ABINGER, C. B.; and eleven of the other Judges.

PRENDERGAST, in support of the objection. This is not a question on the form of the indictment; the sole question is, whether the offence which the prisoner is charged with is an offence punishable under the statute 11 Geo. 4 & 1 Will. 4, c. 66. The 3rd section, as to forging and uttering, mentions East India Bonds and Bank notes, &c.; that section appears to punish the forging of bills, notes, &c., without saying whether they are to be made in this country or elsewhere. In the 16th section it is made an offence to engrave, &c., any part of a bank note, bank bill of exchange, or bank post bill, without the authority of the Governor and Company of the Bank of England. In the 17th section there is a provision with respect to the making of paper with the name or firm of any persons, body corporate, or bankers, other than the Bank of England. In the 18th section provision is made respecting the engraving or making of bills of exchange and promissory notes, purporting to be the bills or notes *of any person or persons*, body corporate, or company, carrying on the business of bankers (*other than and except the Bank of England*). That is the particular section upon which the prisoner was indicted and has been convicted. The question is, whether the offence charged is the offence mentioned in this section. It seems to punish the possession of such bills, &c., generally, without saying whether they are to be made in or out of England, in the same way as the 3rd section provides for cases of forgery and uttering. Then, the 19th section refers to cases of notes of foreign princes or states. Now, the fair inference seems to be that the words of the 18th section must be limited to notes, &c., made in England; otherwise, if it were general, it would not have been

necessary to introduce the 19th section at all. But the 30th section is more material; for it provides for the uttering in England of documents forged abroad, and uses the words, "*in whatever place or country out of England, whether under the dominion of his Majesty or not*, such writing or matter may purport to be made, or may have been made." It is quite clear, therefore, that the legislature has given its own meaning to its own act, and intended to confine the words of the 3rd section to instruments made and payable in England; and yet the words are quite as general in the 3rd as they are in the 18th. The 30th section is introduced for the purpose of putting a construction on the 3rd, which it would not be necessary to put if the words of that section had extended to instruments made and payable out of England: and that is consistent with the construction of all acts of parliament. It is generally considered that general words apply to England only.

ALDERSON, B.—May it not have been that the 30th section was introduced to prevent the 3rd from being affected by the argument to be derived from the separation of the two classes of offences in the 18th and 19th sections?

Lord ABINGER, C. B.—The 29th section limits the act to England, excluding Scotland and Ireland; and the 30th might be intended to get rid of any difficulty that might arise from the limitation, so far as the offence was concerned.

Prendergast.—It seems to me that the legislature dealt with a particular matter as they found it out, like the Athenian gladiators, who found a guard for every part of the body which had been struck.

Lord DENMAN, C. J.—As soon as it was struck, they invented a guard for it.

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Prendergast.—The stamp acts would not be held to apply to places out of England. The rule of law is, that no statute shall extend to the colonies, unless they are expressly mentioned in it.

Lord DENMAN, C. J.—Yes—not to give jurisdiction. But there is no reason why there should not be a general description of instruments in circulation there as well as in England.

Lord ABINGER, C. B.—Has it ever been doubted that the general words of former forgery acts included foreign notes forged or uttered in England?

Prendergast.—The statute 2 Geo. 2, c. 25, is general in its terms. And nearly fifty years after that, comes the 43 Geo. 3, c. 139, which was passed expressly for the prevention of the forgery &c. of foreign notes.

Lord ABINGER, C. B.—I will tell you how that arose. There had been, during the French war, some manufactories in England for the purpose of forging assignats; and it was a prevalent opinion that this was an offence not punishable, and, in consequence, that act was passed, the intention being, not to protect English, but foreign states.

BOSANQUET, J.—You see in that statute no provision is made for places not in England, but within the King's dominions. It cannot be supposed that they were left unprotected.

Prendergast.—In the case of *Rex* v. *Dick* (*a*), which was

(*a*) 1 Leach's Cases in Crown Law, 3rd edit. p. 79; 4th edit. p. 68. The prisoner was convicted at Newcastle-upon-Tyne of knowingly uttering a forged and counterfeited writing obligatory, commonly called a Scotch bank-note. The note was made payable at Aber-

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the case of a Scotch bank note, the Judges were divided; and, though the prisoner was pardoned, yet the case seems somewhat doubtful. But the subsequent decision, in *Rex* v. *M'Kay* (*a*), in the year 1804, settles the law on the subject. That case seems quite decisive of the present in this point of view.

Lord DENMAN, C. J.—There is no positive enactment here that the act shall not extend to the Colonies. There is strong reason to think that the Colonies were not in view at the time of the passing of the act, but there is no express exclusion of them.

PATTESON, J.—The provision is that the act shall not extend to *offences committed* in Scotland.

Prendergast.—I apprehend that unless specially mentioned, instruments circulated in the Colonies are as much

deen. The question submitted to the Judges was, whether the note was within the meaning of the stat. 2 Geo. 2, c. 25, and if so, whether the uttering it in England was felony. "The Judges," says the report, "were divided in their opinion upon both these questions, the 2 Geo. 2, c. 25, negatively excluding *Scotland*, and the note being payable *locally* where it was drawn." The prisoner lay in gaol for some time, and at length received the King's pardon.

(*a*) R. & R., C. C. R. p. 71.—The prisoner was tried before Mr. Justice *Heath*, at the September Old Bailey Sessions in 1803, on an indictment which, among other counts, had one for uttering a certain promissory note for the payment of 5*l*., and on this count he was convicted. The note was a note of the British Linen Company, which was incorporated by royal charter. Reference was made to the stat. 2 Geo. 2, c. 25, which provides that nothing contained in it shall extend to Scotland. An objection was taken that the instrument purporting to be an undertaking for the payment of money by a chartered Scotch Company, only entitled the party to demand payment in Scotland, and could not be put in suit in this country, and therefore was not within the statute: *Rex* v. *Dick*, supra note (*a*), and *Robinson* v. *Bland*, 2 Burr. 1078, were referred to. On the 4th February, 1804, the case was argued by *Gurney* for the prisoner, and *Knapp* for the prosecution, and all the Judges held the conviction wrong; but they did not come to their decision till Trinity Term.

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foreign instruments as any other instruments can be. They cannot be put in suit in England, and are in coins not known to England. The 43 Geo. 3, c. 139, s. 2, seems to have been passed almost immediately after the decision in *Rex* v. *M'Kay*, to protect foreign securities. The 41 Geo. 3, c. 57, was passed to protect bankers' notes in Great Britain or Ireland.

Bodkin, for the Crown.—I confess that the objection when first taken seemed rather formidable; but on a careful consideration of the statutes which were in force at the time this statute was passed, it will appear that the construction which my learned friend contends for is not correct. As to the two cases cited, the ground of decision seems to be at best doubtful. But they proceeded on the statute 2 Geo. 2, c. 25, the 4th section of which contains an express provision that the act shall not extend to Scotland. If this objection can now prevail, it is no offence in England to engrave or to have possession in England of plates intended for Scotch or Irish notes. It is remarkable that among the number of cases decided there is not one to be found in which this point has arisen. The statute 41 Geo. 3, c. 57, is important in considering the effect of the 18th section of the present act. In the 43 Geo. 3, c. 139, there is no mention of persons carrying on business as bankers. My argument therefore is, that the 41 Geo. 3, c. 57, was intended specifically to protect bankers. *Rex* v. *Catapodi*, decided in the year 1803 (*a*), is not precisely in

(*a*) R. & R. p. 65.—The prisoner was tried before Mr. Justice *Heath*, for knowingly and without authority having in his custody a certain plate, upon which said plate was engraved part of a promissory note purporting to be the promissory note of a body corporate called The British Linen Company. Two objections were made by the prisoner's counsel at the trial: first, that the Company not being incorporated for the purpose of carrying on the banking business, did not exist as a corporation, but were mere *nonentities* as to that purpose; that they could not issue any promissory notes nor authorize any person to have plates from whence impressions might be taken, and

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point, but bears upon the case. It is on the statute 41 Geo. 3, c. 57, and related to a plate of part of a promissory note of The British Linen Company in Scotland, I call your Lordship's attention to this case to shew that there was great attention paid to it, and an adjournment of the consideration; and it must have been taken for granted that the possession in England of a plate for a note in Scotland was an offence under the 41 Geo. 3, c. 57. Neither from the Bench nor at the bar was there any doubt expressed on that subject. My friend does not deny that forging and uttering is provided for, but only contends that there is an accidental omission as to the offence charged in this indictment. The second section of the 41 Geo. 3, c. 57, is the original from which the 18th section of this act was taken, and the difference is that the words "dispose of, put off," &c. are left out in the latter. My friend's first argument is, that the 18th section cannot extend to all notes whatever, because in the 19th there is an express provision as to foreign notes. Now I will concede that, for I do not contend that the 18th section applies to all persons whatever, but only to all bankers. The 18th section would be inapplicable to a large class of persons, and therefore the 19th was passed; as, for instance, in the case of the Polish notes, which were notes of a bank of which the Emperor of Russia, as King of Poland, was the sole owner (*a*). It would be sufficient for me to shew that the 18th section applies to notes of bankers within her Majesty's dominions, but I contend that it applies to bankers everywhere. Then

therefore were not within the statute. The second objection was, that the indictment was bad for not containing an averment that the Company "carried on the business of bankers," which are the words of the act. The Judges, after an adjournment of the case from the 1st day of Michaelmas Term, 1803, to the 21st January, 1804, were all of opinion that the indictment was bad for want of the averment mentioned in the second objection. "And it seemed," say the Reporters, "to be the general opinion that the other objection was also fatal."

(*a*) See Vol. 7 of these Reports, pp. 416 to 431 inclusive.

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my friend adverts to the 3rd section, and argues that though the 3rd is equally general with the 18th, yet the legislature thought it necessary to extend it by the 30th. But I submit that the 3rd is not so general as the 18th. As to the 3rd section, *securities avowedly English* are mentioned in the early part, and I apprehend that, according to the usual rules of construction, the instruments which follow must be taken to be instruments ejusdem generis, viz. English instruments, and therefore it became necessary to pass the 30th section, and not, as my friend says, because the words were too general. But it may be said, that the 30th section applies to the 18th. If it did, my friend's argument would be very strong, and it would be exceedingly difficult for me to get over it, because it would be said that the legislature omitted one part intentionally. On a careful view, however, your Lordships will find that the 30th section has no reference at all to the 18th. The words are, that where the forging or altering any writing or matter whatever, or the offering, uttering, disposing of, or putting of, any writing or matter whatever, knowing the same to be forged or altered, is in that act expressed to be an offence, if any person shall in that part of the United Kingdom, called England, forge &c., or offer, utter, &c., any such writing or matter in whatsoever place or country out of England, whether under the dominion of his Majesty or not, such writing or matter may purport to have been made, &c., he shall be deemed to be an offender within the meaning of the act. That obviously refers to instruments which are perfected—it does not touch the making any plate, or having any such plate in possession. But I am aware that, in the 18th section, your Lordships will find the words, " knowingly offer, utter, dispose of, or put off *any paper upon which any part of such bill or note* shall be made or printed." That is levelled against the fabricators.

PARKE, B.—What is to satisfy the word *matter* in the 30th section, if it does not apply to a part of a note?

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Bodkin.—The 18th and 19th sections stand alone, and refer to the manufacturers, and the 3rd and 30th refer to the uttering. As to the word matter, it would be somewhat hard to find a meaning for every redundant and superfluous word in an act—but there is forging the great seal, and there is uttering it—to which the word matter might apply.

PARKE, B.—Those are matters, it is true. But the piece of paper with the incomplete writing would be a matter also.

COLERIDGE, J.—It would be somewhat difficult to apply the word matter to the things in the 2nd section, as they are high treason, and it would be difficult to apply to them the words, "whether within or without his Majesty's dominions."

Prendergast, in reply.—The argument of my friend was good, in favour of the suggested application of the 30th to the 18th section, but his attempted answer to that argument has not been successful. As to the 3rd section, the words are as general as can be. Every description of instrument is included which is mentioned in the 18th.

Their Lordships then considered the case.

Feb. 12*th.*

AT the following session Mr. Justice VAUGHAN gave judgment; after stating the indictment he said:—The real question was, whether or no the offence charged in the indictment was shewn to be within the provisions of the 11 Geo. 4 and 1 Will. 4, c. 66, s. 18, it being contended that that section did not apply to the case. The Judges were of opinion that the conviction was right, there being out of a large number (fifteen I believe) about three, who did not express a contrary opinion; but who had some doubt. I have not had the opportunity of communicating

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with the Judges who tried the case, and, therefore, I do not know what sentence it was intended to pass upon you. I shall communicate with them and afterwards with the RECORDER, and he will intimate to you what the sentence is. All that I say now is, that you will understand that the conviction is upheld.

The prisoner was sentenced to transportation.

FEBRUARY SESSION, 1839.

BEFORE MR. JUSTICE VAUGHAN AND MR. JUSTICE WILLIAMS.

REGINA *v.* JOHN BULL.

February 8th.

The killing of a man on the highway is not justifiable homicide, unless there was an intention on the part of the person killed to rob or murder, or do some dreadful bodily injury to the person killing; or, in other words, the conduct of the party must be such as to render it *necessary*, on the part of the party killing, to do the act in self-defence.

In criminal cases, though the counsel for the prosecution may content himself with putting into the box a witness whose name is on the back of the bill, without asking him any questions on the part of the prosecution; yet, *semble*, that it is better that he should be examined, whether his evidence be favourable to the prosecution or not, as the only object of the investigation is to discover the truth.

THE prisoner was indicted for the manslaughter of William Rushbrooke.

Payne, for the prosecution, in stating the case to the jury, said, that there was one witness examined before the Grand Jury, whom, on account of information he had since received, it was not his intention to use as a witness for the prosecution.

C. Phillips, for the prisoner, objected to any witness being kept back, as it would be unfair towards the prisoner not to examine all those whose names were on the back of the bill.

Payne replied, that of course he should put the witness

into the box; but it was not his intention to rely upon him as a witness for the prosecution.

C. Phillips said, that on the last Oxford circuit, in a case before Mr. Justice Patteson, *Watson*, who was counsel for the prosecution, obsérved, that there were four surgeons who had given evidence before the Grand Jury, but he should only call three of them: upon which the learned Judge said, "Then I shall call the fourth;" and upon the evidence of that fourth surgeon the prisoner was acquitted.

Payne, in reply, stated, that in a case of manslaughter, tried a few sessions ago at the Central Criminal Court before the same learned Judge, the counsel for the prosecution were allowed to abstain from putting questions to two of the witnesses whose names were on the back of the bill; and he further stated, that in the present case he should call the witness, and put him into the box, but did not intend to examine him.

VAUGHAN, J., said—It is the proper course to put the witness into the box. I think that every witness ought to be examined. In cases of this kind counsel ought not to keep back a witness, because his evidence may weaken the case for the prosecution. Our only object here is to discover the truth.

The witness alluded to was put into the box after all the other witnesses had been examined, and a few questions were put to him on the part of the prosecution, but he was not examined as to the facts generally, as the other witnesses were. He was cross-examined at some length on the part of the prisoner. From the evidence it appeared that the deceased was one of a party of six persons who had been drinking together at several public-houses, and were proceeding home along a road, between twelve and one o'clock, on the night of the 18th January, when

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they met the prisoner, who stabbed the deceased with a knife in the arm-pit. There was some discrepancy in the testimony of the witnesses as to the conduct of the deceased and his friends, previous to the infliction of the wound by the prisoner.

C. Phillips addressed the jury on the part of the prisoner, and contended that he was entitled to an acquittal, on the ground that what he did was in self-defence, and amounted in law to justifiable homicide.

VAUGHAN, J., (WILLIAMS, J., being present), in his summing up, inter alia, said, that it was not justifiable homicide unless there was an intention on the part of the deceased and his companions to rob or murder the prisoner, or to do some dreadful bodily injury to him; and that it was not the law that a man would be justified in taking away the life of another, merely because he feared that he might be assaulted, or indeed if he were actually assaulted. His Lordship told the jury, that the question for their consideration was, whether the conduct of the party made it *necessary* for the prisoner to inflict that blow which almost immediately terminated in the death of the deceased—whether he inflicted the wound in self-defence, to save his own life, which was in danger, or to protect himself from some dreadful bodily injury (*a*).

(*a*) The law upon the subject of justifiable homicide is thus stated in Archbold's Criminal Law, p. 221, Title, Murder, Killing in Defence of Property, &c.:—" If any person attempt to rob or murder another in or near the highway, or in a dwelling-house, or attempt to break any dwelling-house in the night-time, and be killed in the attempt, the slayer shall be acquitted and discharged, 24 Hen. 8, c. 5. And the same where a man is killed in attempting to burn a house, 1 Hale, 488; or where a woman kills a man who attempts to ravish her, Bac. Elem. 341, Hawk, c. 28, s. 22; or where a man is killed in *attempting to break open a house* in the daytime with intent to rob, 1 Hale, 488, or *to commit any other forcible and atrocious crime*, Bract. 155, Fost. 273, Kel. 128, 129, 1 Hale, 484. See *R.* v. *Levet*, Cro. Car. 538, and see Fost. 299; *R.* v. *Ford*, Kel. 51. And not only the party

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The jury found the prisoner Guilty, but recommended him strongly to mercy, believing that he committed the act under the apprehension of personal danger. Sentence, three years' imprisonment, with hard labour, and three months' solitary confinement in the course of the imprisonment.

Payne and *Ball*, for the prosecution.

C. Phillips, *Clarkson*, and *Bodkin*, for the prisoner.

[Attornies—*Hunt*, and *Humphries*.]

BEFORE MR. JUSTICE VAUGHAN, AND MR. RECORDER LAW.

REGINA *v.* REEVES.

February 11*th*.

If a child be killed after it has wholly come forth from the body of the mother, but is still connected with her by means of the umbilical cord, it seems that such killing will be murder.

THE prisoner was indicted for the wilful murder of her own infant child, by striking it on the head, and by beating its head against the wall of a room.

Bodkin, in stating the case for the prosecution, said that he had been informed there was a case before Mr. Baron *Parke*, in which it had been decided, that the child must have a separate independent existence from that of the whose person or property is thus attacked, but his servants and other members of his family, and even strangers who are present at the time, are equally justified in killing the assailant, 1 Hale, 481, 484, Fost. 274. The above rule, however, does not extend to felonies without force, such as picking pockets, 1 Hale, 488, *nor to misdemeanors of any kind;* and even in cases within the rule *it must be proved that the intent to commit such forcible and atrocious crime was clearly manifested by the felon,* 1 Hale, 484, *otherwise the homicide will be manslaughter at least*, if not murder. But, in cases within the rule, it may be necessary to observe, that the party whose person or property is attacked is not obliged to retreat, as in other cases of self-defence, but may even pursue the assailant until he find himself and his property out of danger. Fost. 273."

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mother, in order to make the killing of it amount to murder.

Clarkson, who was for the prisoner, stated, that, as it was on his information that *Bodkin* had acted, he felt it his duty, having since read the case referred to, to say that it did not go to so great an extent as his learned friend had supposed (*a*).

VAUGHAN, J.—I should have been very much surprised if it had; because, if that were the law, the child and the after-birth might be completely delivered, and yet, because the umbilical cord was not separated, the child might be knocked on the head and killed, without the party who did it being guilty of murder.

Verdict—Not guilty of murder; but guilty of concealing the birth—Sentence, two years' imprisonment.

Bodkin, for the prosecution.

Clarkson, for the prisoner.

[Attornies—*Yardley*, and *Humphries*.]

(*a*) The case referred to is *Regina* v. *Crutchley*, reported in Vol. 7 of these Reports, p. 814. In that case Mr. Baron *Parke* said to the jury, after referring to the indictment which used the words "did bring forth of her body the said child alive"—"If you think that the child was not killed after it had come forth, you will acquit. I think it is essential that it should have been wholly produced. But supposing you should be of opinion that the child was strangled intentionally while it was connected with the umbilical cord to the mother, and after it was wholly produced, in that case, I should put the matter into a course of further inquiry, directing you to convict the prisoner, and reserving the point for a higher tribunal, my present impression being that it would be murder if those were the facts of the case."

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APRIL SESSION, 1839.

BEFORE MR. RECORDER LAW.

THE QUEEN *v.* EDMUND L. WILSON and MICHAEL WILSON.

THE first count of the indictment stated, that Edmund Lewell Wilson, being employed in the capacity of clerk and servant to William Phillipps, did, by virtue of his said employment, and whilst he was so employed, receive and take into his possession, for and in the name and on account of the said W. Phillipps, his master, the sum of 11*s.*, and the sum of 4*s.* 6*d.*, parcel of the said money, fraudulently and feloniously did embezzle and steal.

The second count charged the prisoner, Michael Wilson as an accessary after the fact.

It appeared from the evidence, that the prisoner, Edmund L. Wilson, had been for some time a town traveller and collector to Mr. Phillipps, the prosecutor, who was an oilman in Strutton Ground, Westminster; and that Michael Wilson was carman to the prosecutor. The prosecutor stated, that it was the duty of Edmund L. Wilson to go round and take orders from customers, and to enter them, on his return to the shop in the evening, in the day or order book, and also to receive monies in payment of such orders; but that he had no anthority whatever to take, or direct the delivery of, any goods from the shop. On the 20th of March, Mr. William Crachnell, one of Mr. Phillipps's customers, gave the prisoner, Edmund L. Wilson, an order for two gallons of mixed pickles, and 14lb. of treacle, which order was entered by him in the order book as for the pickles only. An invoice for the pickles, pur-

A. was indicted for embezzlement as clerk and servant to the prosecutor, and B. was charged as accessary. It appeared that A. was only employed as a town traveller and collector to go round and take orders from customers, and enter them in the books, and receive the money for the goods supplied in consequence; but he had no authority whatever to take or direct the delivery of goods from the shop. A customer having ordered two articles of A., he entered only one in the order book; but B., who was the prosecutor's carman, delivered both articles to the customer. An invoice was made out by the prosecutor for the first article, amounting to 6*s.* 6*d.*, and B. entered the second article at the bottom as 4*s.* 6*d.* A. afterwards received of the customer the whole of the 11*s.*, but only accounted to the prosecutor for the 6*s.* 6*d.*:—*Held*, that the offence committed was not embezzlement, but larceny.

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suant to the entry, was made out by Mr. Phillipps's brother, and given to the prisoner Michael; but he delivered Mr. Crachnell the pickles, and 14lb. of treacle. The sum charged for the pickles was 6*s*. 6*d*.; and Michael entered the treacle at the foot of the invoice at 4*s*. 6*d*. The prisoner Edmund afterwards received the whole amount, viz. 11*s*.; but paid over to Mr. Phillipps 6*s*. 6*d*. only.

LAW, (Recorder), on the statement made by the prosecutor on cross-examination, relative to the duty and authority of the prisoner Edmund, intimated an opinion, that the offence was not embezzlement, but larceny; but added, that as Mr. Justice *Patteson* was then sitting in the other Court—he would consult him on the point. He accordingly went to the adjoining Court for that purpose, and, on his return, said: "I have conferred with Mr. Justice PATTESON, who concurs with me in the opinion I was inclined to entertain of this question; and, on his suggestion, I may put the case in this form,—that the prisoner, Edmund Wilson, does not receive the 4*s*. 6*d*. for or on account of his master, but contrary to, and in breach of, his duty towards that master. I may also liken the case to that of two servants—one of whom has authority to sell, and the other not, but merely to receive money; if the one who has no authority to sell introduces himself behind the counter, and sells his master's goods, putting the money into his own pocket, that is clearly a stealing, for he sells and receives the money contrary to his authority; and he cannot be said to have been employed and intrusted as clerk and servant, and to have received the money by virtue of such employment, where the act is done contrary to that employment. In this case, the servant having authority to send out goods to the amount of 6*s*. 6*d*., puts up goods to the amount of 11*s*., his intention being to put 4*s*. 6*d*. into his own pocket. The time never arrives when he receives that

on account of his master, for all that he does is adverse to, and in fraud of, the interest of his master.

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Verdict—Not guilty.

Clarkson, for the prosecution.

Montagu Chambers, for the prisoner.

[Attornies— ————, and *Crisp*.]

MAY SESSION, 1839.

BEFORE MR. BARON PARKE.

REGINA *v.* MADGE.

May 18*th*.

A person who steals goods in France, cannot be tried in England for the offence, though he be found in possession of the stolen property there.

THE prisoner was indicted for stealing, within the jurisdiction of the Central Criminal Court, various articles of household furniture, &c., belonging to one Colonel Latour.

Clarkson, for the prosecution, stated to his Lordship that the property in question had been deposited by the prosecutor in a house at Boulogne, in France, and that the prisoner had stolen it at Boulogne, but being found in possession of it at the Custom-house in London, he had been taken before the Lord Mayor, who had committed him for trial.

PARKE, B.—There is a case precisely in point on the subject.

Clarkson.—Your Lordship alludes to the case of *Rex* v. *Prowes* (*a*). That case even goes further than the pre-

(*a*) Ry. & Moo. C. C. R., p. 349. The prisoner was charged with stealing at Dorchester a quantity of wearing apparel, the property of

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sent, for there the property was taken at Jersey, which is under the dominion of the British Crown, and yet it was held that the Courts here had not jurisdiction. I recollect also a case before Mr. Serjeant *Arabin*, in which I, not being aware of the decision of the Judges, thought that the bringing of the property into England was a larceny, and Mr. Serjt. *Arabin* thought so too, and the prisoner was convicted; but I am bound to say that a pardon was afterwards granted, on the ground that the decision of the learned Judge was incorrect.

PARKE, B.—There is no doubt upon the point on the authority of *Rex* v. *Prowes*. That case is precisely in point, though rather stronger than the present.

His LORDSHIP afterwards said, that it had been intimated to him that some of the Judges had expressed a wish to have the case of *Rex* v. *Prowes* reconsidered, and that in consequence of this the Lord Mayor had committed the prisoner; but if it was not so, he should act upon the authority of the decision in that case. His Lordship having caused a communication to be made to the Lord Mayor upon the subject, and having received his answer, directed the prisoner to be brought up and the jury to be charged with the indictment. The prisoner was accordingly put to the bar and the jury charged.

PARKE, B., upon this, said that the Lord Mayor had not committed the prisoner for trial in consequence of any

Thomas Cundy. The things had been taken by the prisoner from a box of the prosecutor's at St. Heliers, in the Island of Jersey, and were afterwards found in his possession in Dorsetshire, where he had been apprehended on another charge. The case was considered by all the Judges except Lord *Lyndhurst*, C. B., and *Taunton*, J., in Easter Term, 1832, and they held unanimously that the conviction was wrong, and that the case was not within the stat. 7 & 8 Geo. 4, c. 29, s. 76. See the case of *Rex* v. *Anderson and Others*, as to goods stolen in Scotland, 2 East, P. C. 772, c. 16, s. 156.

intimation from the Judges, that it was desirable to reconsider the case of *Rex* v. *Prowes*, but it was thought right that the prisoner should be publicly tried and acquitted, in order that the attention of the legislature might be drawn to the state of the law, in case they should think it right to interfere by any legislative provision on the subject. His Lordship then told the jury that they had no jurisdiction so as to convict the prisoner, and therefore they must pronounce a verdict of acquittal.

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Verdict—Not guilty.

Clarkson, for the prosecution.

C. Phillips, for the prisoner.

JUNE SESSION, 1839.

BEFORE LORD CHIEF JUSTICE TINDAL.

REGINA *v.* HENRY ALLEN.

June 22nd.

THE prisoner was indicted for a rape upon Ann Rose, on the 29th of May, at Feltham, in Middlesex.

From the evidence of the prosecutrix, it appeared that on the day mentioned in the indictment, at nine o'clock in the evening, she was on her way home from Twickenham to Feltham, where she resided; and on passing a public-house called the Hope, she heard a man in that house say, "Here comes your woman." The prisoner immediately came out of the house, and followed her, and

In a case of rape, since the passing of the statute 9 Geo. 4, c. 31, s. 18, the *only* question for the jury is, whether the private parts of the man did or did not enter into the person of the woman; and the reason for the limitation to that single inquiry seems to be, that it was thought that the law was holding itself up to contempt by having the subtle and critical subjects of emission, &c., discussed before Judges and juries. Therefore, though it appear from the evidence, beyond all possibility of doubt, that the party was disturbed immediately after penetration, and before the completion of his purpose, yet he must be found guilty of having committed the complete offence of rape.

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endeavoured to induce her to enter into conversation with him. She resisted his advances; but notwithstanding her refusal to listen to him, he persisted in pursuing her; and when they reached a lonely part of the road, he suddenly attacked, and threw her down. There was no doubt that there was penetration; but it appeared quite clear from the admissions of the prosecutrix, that the person who attacked her did not in fact complete his purpose; for on her cross-examination she stated that she succeeded in extricating herself from him very soon; and added, that she had no reason to believe that she was the worse for his attack on her. The prisoner all through denied that he was the man, alleging that the prosecutrix, in her agitation and confusion, had mistaken him for some other person.

Payne, for the prisoner.—The evidence clearly shews that the offence of rape was not completed. The words of the indictment are, "*did ravish and carnally know*," and that must mean, did have his will of her, and satisfy his lust while within her person. Anything short of this is only on a parallel with intent to ravish. The words of the statute 9 Geo. 4, c. 31, s. 18, that the carnal knowledge shall be deemed complete "*upon proof of penetration only*," I read as meaning, "when *the only proof shall be of penetration*" (*a*). This cannot mean that it shall be deemed that a man had carnal knowledge, when the evidence shews that he had it not. The object was only to render it unnecessary to prove more than penetration, on account of the woman's possible inability to describe all that actu-

(*a*) Soon after the passing of that statute, Mr. Justice *Taunton* ruled, that, notwithstanding the provision, it was still necessary, in order to complete the offence, that all which constitutes carnal knowledge should have happened, and that the jury must be satisfied from the circumstances that emission took place: *Russell's case*, 1 Moo. & Rob. 122. But this decision was overruled by other individual Judges, and lastly by all in a case reserved, *Rex* v. *Reckspear*, 1 Moo. C C. R. 342, and the same point was determined in *Cox's case*, 1 Moo. C. C. R. 337, and ante, Vol. 5, of these Reports, p. 297.

ally took place. The Legislature cannot have been so absurd as to mean that where there is evidence to shew that the offence was not completed, yet the *inference* arising from proof of the doing of a part shall control the *positive testimony* of the non-performance of the whole.

After addressing the jury on the question of identity, a witness was called for the purpose of proving an alibi, but he was not able sufficiently to speak to the precise time at which he saw the prisoner on the day in question.

Clarkson, in reply.—I agree with the counsel for the prisoner, that the act was not intended to do more than enable a jury to say that the offence was committed, when there was only proof of penetration: but that it was not intended to dispense with proof of the completion of the offence when such proof can be given—still less to decide that the offence shall be considered to have been committed in point of law, when the evidence clearly shews that it was not committed in point of fact.

TINDAL, C. J., in summing up, said—There are two questions for your consideration in this case: the first, whether the prisoner was the person who attacked the prosecutrix; and the second, whether the offence charged was completed or not. With respect to the second question, if you feel any reasonable doubt on the facts as applying to the law, when I shall have stated it to you, viz., whether the offence was actually completed or not, you will have no difficulty, if you have decided the first question in the affirmative, in saying that the prisoner was guilty of an atrocious assault. [His Lordship, after reading the evidence, and making several observations on the question of identity, proceeded thus:] The statute 9 Geo. 4, c. 31, s. 18, recites, that upon trials for rape, &c., "offenders frequently escape by reason of the difficulty of the proof

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which has been required of the completion of those several crimes." It was thought that the law was holding itself up to contempt by having these subtle and critical subjects discussed before judges and juries; and the statute therefore goes on to say, "For remedy thereof be it enacted, that it shall not be necessary, in any of those cases, to prove the actual emission of seed in order to constitute a carnal knowledge, but that the carnal knowledge shall be deemed complete upon proof of penetration only." The only question, therefore, for the jury, in such a case, is, whether the private parts of the man did enter into the person of the woman. It is not necessary to enter into any nice discussion as to how far they entered. However you must be satisfied that there was actual penetration, and not that it is the case of a person attempting to commit the offence, and being disturbed before he had actually penetrated. The prosecutrix may be mistaken as to the extent to which the prisoner had proceeded in the commission of the offence. If, therefore, you feel any doubt whether (and I can use no other word than the statute uses; I am not here to make the law, but only to expound and declare it)—if, I say, you feel any doubt whether it has been proved to your entire satisfaction that there has been penetration, you will acquit the prisoner of the felony (*a*).

Verdict—Guilty.

Clarkson, for the prosecution.

Payne, for the prisoner.

(*a*) See the cases of *Rex* v. *Gammon*, ante, Vol. 5, p. 321; *Rex* v. *M'Rue*, ante, Vol. 7, p. 641; and *Reg.* v. *Jordan*, post.

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JULY SESSION, 1839.

BEFORE MR. COMMON SERJEANT MIREHOUSE.

REGINA *v.* GEORGE JAMES FULLER, GEORGE WESTBROOK, WILLIAM WESTBROOK, AND MERRICK BURRELL.

July 11*th.*

THERE were several indictments against the prisoners. The first indictment stated, that the prisoner Fuller, on the 24th November, 1837, being servant to Russell Pontifex, stole thirty-six milk-washers and plugs, of the value of 4*l.*, the goods of his said master; and that the prisoner George Westbrook received the same of Fuller, well knowing them to have been stolen by him.

There was also a count charging W. Westbrook with receiving them from a certain evil-disposed person. Both prisoners were acquitted upon this indictment, and also upon another which charged Fuller with stealing, on the 3rd of May, 1838, a quantity of valves and other articles, and Westbrook with receiving them, knowing them to have been stolen.

Semble, that where there are several indictments against prisoners, on all of which they have *been arraigned*, the prosecutor having *tried* some of the indictments, and *failed* in obtaining a conviction, ought not to be allowed to postpone the trial of the remaining cases till the next Session.

C. Phillips, and *Clarkson*, for the prosecution, upon this applied to the Common Serjeant to postpone the trial of the remaining indictments till the next Session, on the ground that the prosecutor had not had time to prepare the cases properly for the instruction of counsel (*a*).

The COMMON SERJEANT was of opinion that the application ought not to be granted; but suggested that the matter had better be mentioned to Mr. Justice *Patteson*, who was then sitting in the adjoining Court.

(*a*) The evidence was all contained in one set of depositions, and the difficulty was in selecting and separating the different portions which were applicable to the various indictments.

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Upon this the Common Serjeant and the several Counsel in the case went into the adjoining Court, and the matter was publicly mentioned to Mr. Justice *Patteson* (*a*).

After hearing the objection which the counsel for the prisoners had to make to the proposed postponement—

PATTESON, J., said—The difficulty I feel is not as to this particular case, but on principle. If the application for postponement had been made previous to the prosecutor's going before the Grand Jury, there would have been no doubt as to the propriety of granting it; and I will not say that it might not have been done after the bills had been found, and after the prisoners had been arraigned. But to decide that, after prisoners have been tried upon two indictments, and the evidence has failed, the other indictments against them may be postponed to another Session, in my opinion would be very dangerous. My objection to it is, that it is holding out a premium for the getting up of fresh evidence, and is similar to the case of supplemental affidavits, which we do not allow in the Court of Queen's Bench. It is inviting persons to come forward and give evidence which the prosecutor was not in possession of at the previous Session.

C. Phillips, for the prosecution.—The transactions extend over a period of two years, and there has not been time to separate them properly.

PATTESON, J.—It is very unfortunate; but it is much better that justice should be defeated in this particular case, than that we should break in upon a great principle.

(*a*) This is a much better and far more satisfactory plan, and less liable to mistake and misunderstanding, than the private mention of the matter, in the absence of counsel, by the Judge trying the case to the Judge whose opinion he wishes to obtain. See post, *R.* v. *Sells*.

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The trials proceeded, and the result was, that Fuller and William Westbrook were found Guilty, and George Westbrook and Burrell were Acquitted.

C. Phillips, and *Clarkson*, for the prosecution.

Payne, *Montagu Chambers*, and *Ballantine*, for the several prisoners.

AUGUST SESSION, 1839.

BEFORE LORD DENMAN, C.J.

REGINA *v.* JOHN PULBROOK.

August 17th.

A paper in the following form *held* to be a request for the delivery of goods, though not addressed to any one:—"Augt. 3 '39—One 16-in. helmet scoop—one 4 qt. kettle—Jas. Hayward."

THE prisoner was charged with feloniously forging and uttering a request for the delivery of goods, with intent to defraud Messrs. Warner & Co. The indictment also stated a previous conviction of felony.

The prisoner had been in the employment of Mr. James Hayward, an ironmonger, who stated that he had had dealings for some years with Messrs. Warner, but had not had any account with them for about eighteen months; that the prisoner quitted his service about twelve months ago; and that once or twice, during the time he was in his employ, he had taken orders from him to Messrs. Warner. The witness identified the order in question in this case as being in the prisoner's handwriting, and denied that it was written by his direction or authority.

Richard Ward said, "I am in the service of Messrs. Warner, and received this order from the prisoner, and delivered him the goods stated in it."—Alfred Warner said, "I am the son of one of the partners, and manage their business. It is the custom in our business to deliver goods on the authority of such papers as this. We constantly do it every day." He was asked by the Court whether

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he had done so as between the firm and Mr. Hayward. His reply was, "Certainly; it is the ordinary form of a request to deliver goods to Mr. Hayward or to anybody."

The instrument was in the following form: "Aug. 3, '39.—One 16-in. helmet scoop; one 4 qt. oval kettle.—Jas. Hayward."

The prisoner was found Guilty, and judgment was respited, that the opinion of the Judges might be taken as to whether such a paper amounted in law to a request for the delivery of goods within the meaning of the statute.

Nov. 28*th.* In the November Session, Mr. Baron PARKE pronounced the judgment of the Court, stating that the Judges were of opinion that the document amounted to a request for the delivery of goods within the meaning of the statute, although it was not addressed to any person; and the prisoner was sentenced to be transported for ten years.

C. Clarke, for the prosecution.

See *Carney's case*, 1 Moo. C. C. R. 351, and the other cases collected in Roscoe's Crim. Dig., title Forgery; and the case of *Reg.* v. *Rogers*, post, p. 41.

OCTOBER SESSION, 1839.

BEFORE MR. JUSTICE BOSANQUET AND MR. BARON GURNEY.

October 25*th.*

REGINA *v.* STEPHEN JENKINS.

If a person, *not being the servant* of the party who intrusts him, receive a parcel containing notes to take to a coach-office, and abstract the notes on his way there, and apply them to his own use, he is guilty of larceny.

THE prisoner was indicted for stealing, on the 4th of October, one 20*l.* bank note, and three 10*l.* bank notes, the property of Thomas George Shelton, his master.

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The prosecutor, on his examination in chief, stated that he was an agent to a hosier in Wood-street; that the prisoner had been in his service four years and a half; that on the 4th of October he gave him a parcel to take to the Bull and Mouth Inn, to be sent by the mail to Davis & Wilson, Nottingham; it contained three 10*l.* and one 20*l.* Bank of England notes; that about three days afterwards he received intelligence from Nottingham, in consequence of which he asked the prisoner who he gave the parcel to; that he said he gave it to one of the clerks in the office of the Bull and Mouth, and pointed out the man, who admitted having received the parcel. It appeared that the parcel arrived at its destination, but that the notes, and a letter which had accompanied them, were not in it. Two of the 10*l.* notes and nine sovereigns were afterwards found at the prisoner's lodgings. On cross-examination the prosecutor stated, that the proprietor of the business was Mr. Lowe, of Nottingham, to whom he was an agent, and from whom he received a salary; that the prisoner was Mr. Lowe's servant, and not his; but that the money inclosed in the parcel was his and not Mr. Lowe's.

Bodkin, for the prisoner, submitted that this was not larceny, as the prisoner was not a servant, and consequently there was no trespass.

GURNEY, B., was of opinion, that as the parcel must have been opened, and the notes abstracted, it did amount to larceny.

Bodkin submitted that the cases as to breaking bulk were all cases in which the parties were common carriers.

GURNEY, B., was of a contrary opinion, and, with the assent of BOSANQUET, J., who was present, the case went to the jury, and the prisoner was convicted of stealing,

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but not as a servant, and being recommended to mercy, was sentenced to twelve months' imprisonment.

Bodkin, for the prisoner.

See the case of *R.* v. *Jones*, Vol. 7 of these Reports, p. 151.

NOVEMBER SESSION, 1839.

BEFORE MR. BARON PARKE, AND MR. JUSTICE BOSANQUET.

Nov. 27th.

REGINA *v.* ST. JOHN.

At the Central Criminal Court, a person was indicted for a burglary in a house, which was stated in the indictment to be "at the parish of *W.*" The prosecutor stated that the correct name of the parish was *St. Mary W.* In the statute 4 & 5 Will. 4, c. 36, (the Central Criminal Court Act), s. 2, this parish is called "the parish of W.": *—Held*, sufficient.

BURGLARY.—The prisoner was indicted for a burglary in the dwelling-house of Henry Moody, situate "at the parish of Woolwich," and stealing therein a watch and other articles, above the value of 5*l.*

In his cross-examination, the prosecutor stated, that the correct name of the parish was "the parish of *St. Mary*, Woolwich."

Mr. Clark (the clerk of arraigns) referred the court to the Central Criminal Court Act, 4 & 5 Will. 4, c. 36, s. 2, in which this parish is called "the parish of Woolwich."

BOSANQUET, J.—As it is called "the parish of Woolwich" in the act of Parliament, I think that that is sufficient.

PARKE, B.—The act of Parliament shews that this parish is known by the name of "the parish of Woolwich;" and, being so described in the act, I think that that is an answer to the objection.

Verdict—Guilty of stealing in a dwelling-house, above the value of 5*l.*

Ballantine, for the prisoner.

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REGINA *v.* ROGERS.

A prisoner was indicted on the stat. 2 & 3 Will. 4, c. 123, s. 3, for forging a warrant for the payment of money (not setting it out). The forged paper was as follows:—"This is to satisfy that R. R. *as* swept the flues and cleaned the bilges, and repaired four bridges of the Princess Victoria, (signed) J. N. 4*l.* 10*s.* 0*d.*" It was proved, that, by the course of dealing between the parties, this voucher, if genuine, would have authorized L. & Co. to pay 4*l.* 10*s.* 0*d.*:—*Held*, that it is not necessary that a warrant for the payment of money should be addressed to any particular person; and that as it appeared that this document, if genuine, would have been a voucher for the payment of the money mentioned in it, that was a sufficient proof of the allegation that it was a warrant for the payment of money; and that if, in an indictment for forgery, the instrument be described and not set out, it is matter of evidence whether the instrument comes within the designation given of it in the indictment or not; and that arvements to shew that the document comes *within* the designation given of it in the indictment, are now (in this form of indicting) unnecessary.

FORGERY.—The prisoner was indicted for forging "a certain warrant for the payment of money, to wit, for the payment of the sum of 4*l.* 10*s.*," with intent to defraud William Lightly and another. Second count, for uttering. The forged instrument was not set out in either of these counts, neither did they contain any prefatory allegations or innuendoes.

It appeared that the prisoner was a chimney-sweeper, and had on several occasions been employed to sweep the funnels of the steam-vessel Princess Victoria, and it was proved by Mr. John Nicholson, the engineer of that vessel, that the course of business was for the prisoner when he had swept the funnels to bring in his bill to the witness, who upon that gave him a certificate that the work had been done, and that, on his presenting that certificate at the counting-house of Messrs. Lightly and Simons, he was paid the amount. It was proved by Mr. Thomas, a clerk of Messrs. Lightly and Simons, that the prisoner, on the 11th of October, 1839, presented a paper, of which the following is a copy, and received from the witness the sum of 4*l.* 10*s.* 0*d.*

"Oct. 11, 1839.

"This is to satisfy that R. Rogers *as* swept the flues, and cleaned the bilges, and repaired four bridges of the Princess Victoria.

"J. NICHOLSON."

"4*l.* 10*s.* 0*d.*

It was proved by Mr. Nicholson that this was a forgery; and to shew guilty knowledge evidence was given of the

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uttering of a similar forged document by the prisoner on the 18th of October, 1839.

Prendergast, for the prisoner.—This is rather a certificate of work done than a warrant for the payment of money.

BOSANQUET, J.—This is not a case in which the warrant is set out in the indictment: and as the indictment has been framed on the statute 2 & 3 Will. 4, c. 123, s. 3, without setting it out, the question is, whether on the evidence this is shewn to be a warrant for the payment of money. It has been proved that this was the mode of transacting business that had been usual with these parties, and if this, provided it had been a genuine voucher, would have properly authorized the payment of the money, I think that enough has been shewn to sustain this indictment.

PARKE, B.—I think that the written evidence and the parol testimony taken together, shew that the paper, if genuine, would have authorized the payment of the sum mentioned in it. Under the old law averments would have been necessary to shew that this was a warrant for the payment of money; but as the law is at present, no such averments are necessary, if the indictment is framed on the 3rd section of the statute 2 & 3 Will. 4, c. 123. In the present case it appears by the evidence which has been given, that this (if genuine) was a voucher for the payment of this money. If you describe the instrument in the indictment instead of setting it out, averments are, since the statute 2 & 3 Will. 4, c. 123, not necessary as they were before that act; and if the instrument be described under that statute, it is matter of evidence whether the instrument comes within the description given of it by the indictment.

Prendergast.—The paper is not addressed to any one.

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BOSANQUET, J.—It is not necessary that it should be addressed to any particular person.

PARKE, B.—The evidence of the course of dealing shews that (if genuine) it would have been an authority to Messrs. Lightly and Simons to pay the amount.

Verdict—Guilty.

Prendergast, for the prisoner.

PARKE, B.—A question of this kind was considered by the Judges in the case of *Reg.* v. *Raake* (*a*).

(*a*) Ante, Vol. 8, p. 626.

REGINA *v.* ELIZABETH HOLLOWAY.

Nov. 30th.

The Grand Jury had come into Court and had been discharged and had left the Court, but had neither left the building nor separated. The Judges directed them to be sent for back into Court, and directed another bill of indictment (the witnesses on which were going abroad) to be sent before them.

THE Grand Jury had come into court, and on their foreman stating that there were no more bills, Mr. BARON PARKE discharged them. The Grand Jury retired from the court, and it being stated to his Lordship almost immediately afterwards, that there was another bill, and that the witnesses on it were going abroad, his Lordship directed that the Grand Jury should be sent for, provided that they had not separated.

The Grand Jury returned into court, and their foreman stated that they had not separated, and that all of them had continued together in the Sessions-house after they had left the court.

PARKE, B.—I wish you to consider another bill before you separate.

The Grand Jury retired, and afterwards returned a true bill against Elizabeth Holloway for stealing a shirt.

1839.

Nov. 30*th.*

REGINA *v.* BIRD.

A. was charged with breaking into the house of K. and stealing the goods of M. It was proved by M. that K., his brother-in-law, had taken the house, and that M. (who lived on his property) carried on the trade of a silversmith for the benefit of K. and his family, having himself neither a share in the profits nor a salary. M. stated that he had authority to sell any part of the stock, and might take money from the till, but he should tell K. of it, and that he sometimes bought goods for the shop, and sometimes K. did it:—*Held*, that M. was a bailee, and that the goods in the shop might properly be laid as his property. It was proved as to the breaking that the glass of the window had been cut about a month before, but that every portion of the glass remained in its place till the prisoner pushed it in and stole the goods:—*Held*, a sufficient breaking.

HOUSEBREAKING.—Indictment for breaking and entering the dwelling-house of Louis Kyezor, and stealing a watch, the property of David Miers.

It was proved by Mr. Miers, that the house was taken by his brother-in-law, Mr. Kyezor, and that the witness (who lived on his own property) carried on the business of a silversmith there for the benefit of Mr. Kyezor and his family, but had himself no share in the profits and no salary. He stated, that he had power to dispose of any part of the stock, which was worth near 3,000*l.*, and that he might, if he pleased, take money from the till as he wanted it, but he should inform his brother-in-law that he had so done. He also stated, that he sometimes bought goods for the shop, but that sometimes his brother-in-law did so; with respect to the breaking, he stated, that a pane of glass in the shop window had been cut for as much as a month before, but that there was no opening whatever, as every portion of the glass remained exactly in its place, and that at the time of the theft he both saw and heard the prisoner put his hand through the glass, and take the watch.

Horry, for the prisoner, submitted—First, that as Mr. Miers exercised so much dominion over the stock in the shop, he ought to have been described as a partner with Mr. Kyezor; and, secondly, that as the glass of the window had been cut before, there was no breaking.

BOSANQUET, J.—Upon this evidence, Mr. Miers was a bailee of the stock, and therefore in a case of this kind the property may be properly laid in him; and with respect to the breaking, that is quite sufficient to support the present indictment.

Verdict—Guilty.

Horry, for the prisoner.

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Nov. 30*th.*

REGINA *v.* ELIZABETH PARKER.

In a case of arson it was proved that "the floor near the hearth was scorched. It was charred in a trifling way. It had been at a red heat, but not in a blaze": —*Held*, that this would be a sufficient burning to support an indictment for arson.

ARSON.—The prisoner was indicted for setting fire to the house of Edward Stammers, persons being therein at the time of the offence (*a*).

The only evidence to shew that the house was on fire was that of a fireman, named Barker. He said, "The floor near the hearth had been scorched; it was charred in a trifling way; it had been at a red heat, but not in a blaze."

PARKE, B.—That would be sufficient.

The witness, in answer to further questions, stated, that he had not examined the floor to ascertain how deeply the charring went in; neither could he at all form a judgment as to how long it had been done.

BOSANQUET, J., (to the jury).—We think that this evidence is much too slight, and that you ought to require better proof that the house was on fire at the time in question. This is the only evidence on this part of the case, and we think you ought to acquit.

Verdict—Not Guilty.

(*a*) Under the stat. 1 Vict. c. 89, s. 3.

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COURT OF QUEEN'S BENCH.

Sittings at Westminster after Michaelmas Term, 1839.

BEFORE LORD DENMAN, C. J.

Doe, on the demise of Goslee *v.* Goslee.

Dec. 2nd.

In ejectment the lessor of the plaintiff made out his title as the heir of W. G. The defendant put in the will of W. G. made in 1837, devising the property to the lessor of the plaintiff and T. G.:—*Held*, that the lessor of the plaintiff might put in another will of W. G. made in 1838, devising the whole property to the lessor of the plaintiff, and that the lessor of the plaintiff was not bound to make this will part of his original case. Under these circumstances the defendant's counsel will be allowed to reply on the new case set up by the lessor of the plaintiff, and the counsel for the plaintiff has the general reply.

EJECTMENT for a house at Edmonton.

It was opened by *Humfrey*, for the plaintiff, that the house had belonged to the late Mr. Thomas Goslee, and that the lessor of the plaintiff was his eldest son, the defendant being his daughter, and that the lessor of the plaintiff claimed as the heir of Thomas Goslee.

Evidence was given that Thomas Goslee received the rents of the house in question, and that he died on the 4th July, 1838, and that the lessor of the plaintiff was his eldest son.

W. H. Watson, for the defendant, put in a will, made and duly executed by Thomas Goslee, dated the 25th of April, 1837, by which he bequeathed the house in question to his sons, Charles (the lessor of the plaintiff) and Thomas.

Humfrey, for the plaintiff, proposed to put in another will, executed by Thomas Goslee, in the year 1838, by which he devised the house to the lessor of the plaintiff alone.

W. H. Watson.—Does your Lordship think that this can be done now? The lessor of the plaintiff relied on a case as heir, and can he now be allowed to set up a will? If the lessor of the plaintiff had meant to have relied on this will, he should have done so in the first instance.

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DOE d. GOSLEE v. GOSLEE.

Humfrey.—We rely on the title as heir, and only wish to put in this will to shew that the will of 1837 is revoked.

Lord DENMAN, C. J.—I think they may do it.

The will of 1838 was put in, and the case ultimately turned on the question, whether, at the time of the making of this will, the testator was of sound disposing mind.

W. H. Watson replied on the new case set up by the lessor of the plaintiff, and *Humfrey* had the general reply.

The jury found that the testator was not of sound disposing mind, and a verdict was entered for the plaintiff for a moiety of the property.

Humfrey, and *Peacock*, for the plaintiff.

W. H. Watson, for the defendant.

[Attornies—*H. Thomas*, and *Hawkins*.]

CLAY, ESQ., *v.* THACKRAH.

Dec. 7th.

To an action of trespass on land the defendant pleaded that for 20, 30, 40, and 60 years he and the occupiers of a mill had (as an easement) gone on the land to repair the banks of a stream which flowed to the mill. Replication, denying the rights claimed.

It appeared that within forty years B. had been lessee of the mill under one landlord, and of the land under another:—*Held*, that this was such a unity of possession as prevented his having an easement on the land.

Held, also, that this unity of possession need not be specially replied, and that without a special replication the lease of the land to B., and letters written by B. while lessee of the mill, and before he became lessee of the land, were receivable in evidence.

Held, also, that B.'s lease of the land having expired more than 30 years ago, the acts of the occupiers of the mill in repairing the banks ever since that time, without any leave asked by them, or any notice from the other side of any adverse claim, must be taken to be done as of right.

Where, by a Judge's order, a copy of a letter sent by R. to M., dated December 16, 1836, was ordered to be admitted, it is not enough to put in the notice to admit and the Judge's order, and to put in a copy of a letter from R. to M. of that date; but if a witness also prove that he was at the Judge's chambers when the order was made, and that he produced to the clerk of the opposite attorney the copy of the letter proposed to be given in evidence, that is sufficient.

TRESPASS.—The first count of the declaration was for breaking and entering the plaintiff's close, called the Large

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Paddock, (described also by the abuttals), on the 14th of March, 1837, and on divers other days and times: second count, for breaking and entering the plaintiff's close, called Long Meadow (described also by abuttals) at the same days and times.

Plea, first, that the defendant was and is the occupier of a certain ancient mill, called Twickenham Oil Mill, situate upon a stream called Isleworth Mill River, and of right ought to have the benefit of the water of the said river flowing to the said mill, and "that the respective occupiers of the said mill, for the full period of twenty years next before the commencement of this suit, actually enjoyed as of right and without interruption by themselves and their servants, the liberty, easement, and privilege of repairing and amending such parts of the banks and sides of the said stream, called Isleworth Mill River, as are situate within and are parts of the said closes, in which &c., as occasion required, to prevent the water of the said river escaping, oozing, or running through the said banks and sides in consequence of the defects and insufficiencies thereof, and so that the water of the said river might flow to the said mill for supplying the same with water for the working thereof, and, for the purposes aforesaid, to enter the said closes in which &c., and to do and perform in and upon the said closes all such things as should be necessary for the purpose of enjoying and using the said liberty, easement, and privilege. The plea went on to aver that because the banks were ruinous and in bad condition, and the defendant having to repair them, he entered the closes for the purpose of repairing them, and did repair them as he lawfully might, and in so doing unavoidably trod down, &c., the grass, &c. doing no unnecessary damage (*a*), (con-

(*a*) As the forms of this plea and the replication to it may be useful in practice, we have subjoined them:—

"*Form of Plea.*—And the defendant, by W. H. M., his attorney, says, that he, the defendant, at the said several times when &c., and from thence hitherto, hath been,

cluding with a verification). Second plea: the like, substituting thirty years for twenty years. Third plea: the

and still is the occupier of a certain ancient mill called Twickenham Oil Mill, with the appurtenances, situate upon the said stream called Isleworth Mill River, and by reason thereof, before and at the time of the committing of the several alleged trespasses in the declaration mentioned, of right ought to have had and enjoyed, and still of right ought to have and enjoy the benefit and advantage of the water of the said river, which, during the said several times when &c., ought to have flowed to the said mill for the working thereof: and the defendant further says, that the respective occupiers of the said mill for the full period of twenty years next before the commencement of this suit, actually enjoyed as of right and without interruption by themselves and their servants the liberty, easement, and privilege of repairing and amending such parts of the banks and sides of the said stream called Isleworth Mill River, as are situate within and are parts of the said closes in which &c., as occasion required, to prevent the water of the said river escaping, oozing, or running through the said banks and sides in consequence of the defects and insufficiencies thereof, and so that the water of the said river might flow to the said mill for supplying the same with water for the working thereof, and, for the purposes aforesaid, to enter the said closes in which &c., and to do and perform in and upon the said closes all such things as should be necessary for the purpose of enjoying and using the said liberty, easement, and privilege: and because the said banks and sides of the said river situate in the said closes in which &c., at the several times when &c., were ruinous, defective, and in bad condition, and insufficient for want of needful and necessary reparation and amendment, he the defendant being such occupier of the said mill as aforesaid, and having occasion to repair and amend the said banks and sides of the said river situate in the said closes in which &c., for the purposes aforesaid, at the several times when &c., entered on the said closes in which &c., for the purpose of repairing and amending the said banks and sides of the said river situate in the said closes in which &c., as he lawfully might for the cause aforesaid, and did repair and amend the same; and in so doing he the defendant unavoidably a little trod down, trampled upon, consumed and spoiled a little of the grass and herbage of the plaintiff then there growing, and did tear up, subvert, and damage and spoil a little of the earth and soil of the said closes, and did cast and throw the earth, stones, and rubbish in the declaration mentioned upon the said closes in which &c., doing no unnecessary damage to the plaintiff on the occasions aforesaid, as he lawfully might for the cause aforesaid, which are the same several alleged trespasses in the declaration mentioned, and whereof the plaintiff hath above complained against him the defendant.—And

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like, substituting forty years for twenty years. Fourth plea: the like, substituting sixty for twenty years. Fifth plea: leave and license.

Replication to the first four pleas denying the rights stated in those pleas, and a replication de injuriâ to the plea of leave and license.

The defendant's counsel began.

It appeared that the mill in question belonged to the Duke of Northumberland, to whom the defendant was lessee, and that the site of the mill was, on the 29th of March, 1755, demised by the Earl and Countess of Northumberland to Mr. Thomas Betts for the term of 50 years, from the 5th of April, 1755, with liberty to Mr. Betts to erect a mill. It appeared also that the mill in question had been erected, and that for upwards of fifty years Mr. Betts, and the occupiers of the mill who had succeeded him, had entered on the lands in question to repair the banks as often as it was necessary.

It was opened by *Campbell*, A. G., for the plaintiff,—that the lands in question, which now belonged to the plaintiff, had in the year 1758 belonged to the Earl of Feversham, who had let them to Mr. Betts (who was then lessee of the mill) for a term of forty-seven years, which had expired in the year 1805; and he submitted that as there was a unity of

this the defendant is ready to verify, &c."

"*Replication.*—And the said plaintiff as to the plea of the defendant by him first above pleaded, says, that the respective occupiers of the said mill did not, for the full period of twenty years next before the commencement of this suit, enjoy as of right, and without interruption by themselves and their servants, the liberty, easement, and privilege of repairing and amending such parts of the banks and sides of the said stream called Isleworth Mill River, as are situate within and are parts of the said closes in which &c., in manner and form as the defendant hath above in his said first plea alleged, and this the plaintiff prays may be inquired of by the country, &c."

possession of the lands and the mill, the occupier of the mill could not be said to have an easement on the lands; and that, if the repairing of the banks was originally done by permission under the Earl of Feversham's lease, no adverse right would accrue by the continuance of it after the lease had expired; and with respect to the plea of leave and license, it would be shewn that all license was revoked before this trespass.

It was proposed, on the part of the plaintiff, to put in the lease of the land from the Earl of Feversham to Mr. Betts.

C. Cresswell, for the defendant.—I submit, that this lease is not receivable in evidence on these pleadings. It is not denied on the other side that we did not in point of fact, exercise the right, but it is said to have been done under a contract; this, I submit, should be specially replied under the 5th section of the stat. 2 & 3 Will. 4, c. 71.

Lord DENMAN, C. J.—I thought so at Exeter (*a*), but the Court afterwards thought otherwise.

Wightman, for the defendant.—I admit that the plaintiff might shew acts done inconsistent with our acts, so as to shew that our acts were not of right; but here the plaintiff proposes to go into a case which is clearly within the latter part of the 5th section.

Lord DENMAN, C. J.—I shall receive the lease.

The lease was put in. It was a lease dated the 2nd of June, 1758, from the Earl of Feversham to Mr. Betts of the lands in question, "with full and free liberty to use and

(*a*) In the case of *Tickle* v. *Brown*, 6 N. & M. 230: see also the cases of *Bright* v. *Walker*, 1 C., M. & R. 211; *Monmouthshire Canal Company* v. *Harford*, Id. 614; *Beazeley* v. *Clarke*, 3 Scott, 258; *Onley* v. *Gardiner*, 4 M. & W. 498; and, Gale on Easements, 424.

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employ the space of ten feet of assize in breadth for banking, and to raise the same banks, on any part of the extent thereof, to any height not exceeding two perpendicular feet from the present surface of the ground, for the better use and enjoyment of the mill erected by the said Thomas Betts on the stream of the said river, in pursuance and by virtue of a contract for that purpose made by him with the said Earl of Northumberland."

It was proposed, on the part of the plaintiff, to put in a memorial of Mr. Betts written to Lord Feversham, and some letters to his agents written after Mr. Betts became lessee of the mill, and before the lease from Lord Feversham.

C. Cresswell, for the defendant, objected, that Mr. Betts's letters were not receivable in evidence.

Lord DENMAN, C. J.—I think I must receive them.

The letters were read.

To prove the revocation of any license, it was proposed to put in copies of a notice given by Messrs. Roy, Blunt, & Co., the plaintiff's attornies, to Mr. Morris, the defendant's attorney, and also the letter of Messrs. Roy, Blunt, & Co., inclosing that notice.

To render these copies admissible, an order of Mr. Justice Williams was put in, by which Mr. Justice Williams by consent did order "that the defendant upon the trial of this cause hereby make the admissions specified by the notice served by the plaintiff's attorney or agent upon the defendant's attorney or agent, dated the 4th day of December, 1839."

The notice to admit, which was in the form prescribed by the rule of H. T., 2 Will. 4, c. 20, was annexed to this order, and at the foot of it was written, in the handwriting of a clerk of Mr. Justice Williams, "Notice referred to in

the annexed order." At the end of the notice was the following:—

Description of Documents—Copies.	*Date.*	*Original or Duplicate served, sent, or delivered, when, how, and with whom.*
A letter from Messrs. Roy, Blunt & Co., to W. H. Morris. A notice inclosed in such letter.	15th Dec. 1836.	Original sent per post on date.

C. Cresswell.—How do we know that the copy of the letter and of the notice proposed to be put in, are copies of the same letter and notice that are mentioned in the admission? There may be many letters and notices of the same date.

It was proved by Mr. Field that he attended at Mr. Justice Williams's chambers, when the order was made, and that he produced to the clerk of Mr. Morris, the defendant's attorney, the copies now proposed to be read, and that Mr. Morris's clerk said he would admit them.

Lord DENMAN, C. J.—That is sufficient.

The notice was read. It was dated December 15th, 1836, and it was a notice to the defendant "not to go upon, touch, or in any way interfere with the banks of a river known as Isleworth Mill stream, where the same flows through the grounds of the Fullwell Lodge estate."

Lord DENMAN, C. J., in summing up.—This is an action by Mr. Clay, the owner of the Fullwell Lodge estate, against the tenant of the Duke of Northumberland, for a trespass committed in repairing the banks of a stream. The defendant, very properly, does not plead the general issue, but at once enters on the question of right; and he pleads, that for twenty, thirty, forty, and sixty years, he

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has of right repaired these banks. I think that the pleas as to the forty years and sixty years are put out of the case by the unity of possession within both those periods. Mr. Betts had a lease of the mill, and was lessee of the land; and it appears to me that he had such a community of interest as would prevent him from claiming an easement on the one while he was owner of the other. With respect to the twenty years and thirty years, it is proved that the defendant, and those who held the mill before him, have repaired these banks for the whole of these periods. Primâ facie this would be evidence that they did it as of right, and the act of Parliament was intended to make long enjoyment evidence of a right. The plaintiff's counsel admit these facts, and meet them by saying that this was originally matter of contract; and the question is, whether, when Mr. Betts's lease expired in 1805, all that was done afterwards was not done as of right. I confess it appears to me to admit of little doubt. When a lease expires, new persons come in; and when that is so, the parties who become owners should at once say, "The right is at an end, and you must not exercise it." If it were otherwise, the act of Parliament would be a snare to persons instead of a benefit; and persons would lay out their money on the faith of long enjoyment, which might afterwards be met in this way. I think that the early transactions under the expired lease have little bearing on this part of the question. There is nothing like a renewal of any license within the twenty and thirty years; these acts have been uniformly done by the defendant and his predecessors at the mill, without any leave asked on the one side, or notice of any adverse claim on the other; and I think that it must be taken, that what was done was done as of right.

Verdict for the plaintiff, as to the right claimed for forty years and sixty years, and on the plea of leave and license; and for the de-

fendant as to the right for twenty years and thirty years (*a*).

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Campbell, A. G., Sir *W. Follett*, *W. H. Watson*, and *Wilson*, for the plaintiff.

C. Cresswell, *Wightman*, and *Corrie*, for the defendant.

[Attornies—*Blunt*, *Roy & Co.*, and *W. H. Morris*.]

(*a*) It may be well worthy of consideration whether, under the stat. 2 & 3 Will. 4, c. 71, sect. 1, a plea of 30 years' user, applies to a right of this kind.

Adjourned Sittings in London after Michaelmas Term, 1839.

BEFORE LORD DENMAN, C. J.

THE CHELTENHAM AND GREAT WESTERN UNION RAILWAY COMPANY *v.* PRICE.

Dec. 12*th*.

DEBT for a call of 5*l*. per share upon ten shares in this Company (*a*). Pleas—first, nunquam indebitatus; and secondly, that the defendant was not a proprietor.

By the Cheltenham and Great Western Union Railway Act, 6 Will. 4, c. lxxvii, it is enacted, that in an action for calls on shares in that Company, the book of shares, under the seal of the Company, shall be primâ facie evidence that a party is proprietor of shares. It appeared that a call was made in October, 1836, and that the book of shares, which contained the name of the defendant as a shareholder, was made up before the end of September, 1836, from claims sent in by different parties, but that the seal was not affixed to it till November, 1836:—*Held*, that this book was no evidence that the defendant was a proprietor of shares at the time of the call in October, 1836.

(*a*) By the stat. 6 Will. 4, c. lxxvii. (local and personal), sect. 145, it is enacted, "that in any action to be brought by the said Company against any proprietor for the time-being of any share in the said undertaking, to recover any money due and payable for or in respect of any call, it shall be sufficient for the said Company to declare and allege that the defendant, being a proprietor of a share, or so many shares, as the case may be, in the said undertaking, is indebted to the said Company in such sum of money as the call or calls in arrear shall amount to, for a call or so many calls of such sum or sums of

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By the 143rd section of the stat. 6 Will. 4, c. lxxvii., it is, with respect of calls on shares in the Company, enacted "that the directors, to be appointed as aforesaid, [under this act], shall have power from time to time to make such

money upon a share or so many shares belonging to the said defendant whereby a right of action hath accrued to the said Company by virtue of this act without setting forth the special matter."

As the form of the declaration and second plea may be useful in practice, we have subjoined them:

"*Declaration.*—In the Queen's Bench. The 17th day of January, in the year 1838, London (to wit). The Cheltenham and Great Western Union Railway Company, by F. H. J., their attorney, complain of Mark Price, who has been summoned to answer the said Cheltenham and Great Western Union Railway Company, by virtue of a writ issued on the 29th day of December, in the year of our Lord 1837, out of the Court of our Lady the Queen, before the Queen herself at Westminster, for that whereas the defendant, on the 1st day of December, in the year of our Lord, 1837, and from thence hitherto being, and now being the proprietor of divers, to wit, ten shares in the undertaking mentioned in and authorized by a certain act of Parliament made and passed in the sixth year of the reign of his late Majesty King William the Fourth, for making a railway from Cheltenham and from Gloucester to join the Great Western Railway near Swindon, to be called "The Cheltenham and Great Western Union Railway," with a branch to Cirencester, (that is to say), a certain undertaking for making and maintaining the railway and other works mentioned in the said act, was and still is indebted to the plaintiffs in 50*l.* for a call of the sum of 5*l.* upon each and every of the said ten shares belonging to the defendant in the said undertaking, whereby and by reason of the non-payment thereof a right of action has accrued to the plaintiffs by virtue of the said act of Parliament, to demand and have of and from the defendant the said call of 5*l.* upon each of the said shares, together with interest upon the same after the rate of 5*l.* per cent. per annum from the day appointed for the payment of the said call, amounting in the whole to the sum of 80*l.* above demanded; yet the defendant, although often requested so to do, has not as yet paid the said sum above demanded or any part thereof; but he to do this hath hitherto wholly refused, and still does refuse, to the damage of the plaintiffs of 30*l.*, and therefore they bring suit, &c.

"*Second plea.*—And for a further plea the said defendant says, that he was not nor is the proprietor of the said shares in the said undertaking mentioned, nor of any or either of the said shares in manner and form as the said plaintiffs have above in their said declaration alleged, and of this the said defendant puts himself upon the country, &c."

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calls of money from the subscribers to, and proprietors of, the said undertaking, for the time-being, to defray the expenses of, and to carry on the same, as they from time to time shall find necessary, so that the aggregate amount of calls made, or principal money paid for or in respect of any such shares, shall not amount to more than the sum of one hundred pounds on any such share, and so that no such call shall exceed the sum of ten pounds upon each share, which any person or corporation shall be possessed of or entitled unto in the said undertaking, and that the total amount of such calls in any one year shall not exceed twenty-five pounds upon each share, and so that an interval of three calendar months, at the least, shall always elapse between the day appointed for payment of one call and the day appointed for payment of the next succeeding call, and twenty-one days' notice, at the least, shall be given of every such call by advertisement inserted in two or more newspapers circulating in the county of Gloucester, and in one or more newspaper or newspapers published in London; and all monies so called for shall be paid to such persons at such times and places and in such manner as in such notice shall be appointed; and the respective owners of shares in the said undertaking shall pay their rateable proportion of the monies to be called for as aforesaid to such persons, and at such times and places, and in such manner, as shall be appointed as aforesaid; and if any owner or proprietor, for the time-being, of any such share shall not so pay such his rateable proportion, then and in such case, and as often as the same shall happen, he shall pay interest for the same, after the rate of five pounds per centum per annum, from the day appointed for the payment thereof up to the time when the same shall be actually paid; and if any owner or proprietor, for the time-being, of any such share shall neglect or refuse to pay such his rateable proportion, together with the interest, if any, which shall accrue for the same, then, or at any time thereafter, it shall be lawful for the said Com-

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pany to sue for and recover the same in any of his Majesty's Courts of Record by action of debt, or on the case, or by bill, suit, or information; or the said directors may, if they think proper, and they are hereby authorized to declare the shares belonging to such owner to be forfeited, and to order such shares to be sold."

To prove this part of the case, a resolution of the directors for the making of this call, dated October the 11th, 1836, was put in. It was contained in the minute book, which, (by section 128 of the act), is made evidence.

The advertisements in the Gloucester Journal, Cheltenham Free Press, and Times Newspaper, announcing the resolution of the directors, dated the 11th of October, 1836, were put in.

By the 138th section of the act, it is enacted, "That the said Company shall, and they are hereby required, at their first or some subsequent general meeting, and afterwards from time to time, as occasion may require, to cause the names of the several corporations, and the names and additions and places of abode of the several persons who shall then be, or who shall from time to time thereafter become, entitled to shares in the said undertaking, with the number of shares which they are respectively entitled to, and the amount of the subscriptions paid thereon, and also the proper number by which every share shall be distinguished, to be fairly and distinctly entered in a book, to be kept by the said Company; and after such entry made, to cause their common seal to be affixed thereto; and by the latter part of sect. 145 it is enacted, that "on the trial of such action [for calls] it shall only be necessary to prove that the defendant at the time of making such respective calls was a proprietor of such shares in the said undertaking, as such action is brought in respect of, or some one such share, and that such notice was given as is directed by this act of such call or calls having been made, without proving the appointment of the directors who made such call or calls, or any other matter whatever.

And the said Company shall thereupon be entitled to recover what shall appear due, including interest computed as aforesaid, on such call or calls, unless it shall appear that the principal monies previously paid on any such share, together with such call, exceeded the sum of 100*l.* on each share, or that any such call exceeded 10*l.* upon each share, or was made payable before the expiration of three calendar months from the day appointed for payment of the last preceding call, or that notice was not given as hereinbefore required, or that calls amounting to more than 25*l.* in the whole had been made in some one year; and in order to prove that the defendant was a proprietor of such share or shares in the said undertaking as alleged, the production of the book in which the said Company is by this act directed to enter and keep the names and additions of the several proprietors from time to time of shares in the said undertaking, with the number of shares they are respectively entitled to, and of the places of abode of the several proprietors of the said undertaking, and of the several persons and corporations who shall from time to time become proprietors thereof or be entitled to shares therein, shall be primâ facie evidence that such defendant is a proprietor, and of the number and amount of his shares therein."

The book mentioned in the 138th section of the act was produced by Mr. Merrick, the secretary of the Company, and in it the name of the defendant was inserted as the proprietor of ten shares, from No. 1253 to No. 1262, both inclusive.

It was proved by Mr. Merrick, that these entries in the book were made before the end of September, 1836, but that the seal of the Company was not affixed to the book till the 3rd of November in that year. He also stated that the book was made from a rough draft which had been prepared from written claims by which the different shareholders claimed to be registered for their respective shares.

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Peacock, for the defendant.—I submit, that there is no evidence that the defendant was a shareholder at the time of the call on the 11th of October, 1836; the book is not evidence till the seal is affixed to it, which was in November. It may be that there is primâ facie evidence from the book that he was a shareholder in November, but that is no proof that he was so in October.

Lord DENMAN, C. J., held that there was no evidence to go to the Jury that the defendant was a shareholder at the time of the call in October, and directed the plaintiff to be nonsuited, with liberty to move to set aside the nonsuit.

Nonsuit (*a*).

C. Cresswell, *R. V. Richards*, and *Cripps*, for the plaintiff.

Campbell, A. G., and *Peacock*, for the defendants.

[Attornies—*Bayley*, and *J. & W. Murray*.]

(*a*) No motion was made.

Dec. 13*th*.

TEBBUTT, Gent., one &c., surviving partner, *v.* AMBLER.

A paper in the following form, signed by the party, "Memorandum, 30th April, 1836, Settled all accounts of law business up to this day, and will give a receipt in full of all demands when called for, (signed) J. T.;" stamped with an agreement stamp, is receivable in evidence without a receipt stamp.

ASSUMPSIT.—The first count of the declaration was on an attorney's bill by the plaintiff, as surviving partner of Thomas Tebbutt, deceased; second count, for money paid; third count, on an account stated, with a promise in the lifetime of the deceased Mr. Tebbutt; fourth count, for work and labour by both partners; fifth count, work and labour by the plaintiff alone; sixth and seventh counts, money paid and account stated with the plaintiff. Pleas—First, except as to 104*l*. 1*s*. 9*d*., parcel of the money claimed by the fifth, sixth, and seventh counts, non assumpsit; second, as to 104*l*. 1*s*. 9*d*., payment of that sum; third, except as to that sum the Statute of Limitations; fourth, payment

into Court of 104*l.* 1*s.* 9*d.*, and no greater damages; fifth, a set-off.

Replication traversing the allegations of the pleas.

On the part of the defendant, it was proposed to put in the following paper, which had been stamped with an agreement stamp, on payment of the penalty. It was signed by the defendant:—

"Memorandum, 30th of April, 1836.—Settled all accounts of law business up to this day, and will give a receipt in full of all demands when called for.

"(Signed) John Tebbutt."

Platt, for the defendant.—I submit, that this paper is not receivable in evidence without a receipt-stamp. By the Stamp Act, 55 Geo. 3, c. 184, schedule (part 1) "Receipt," it is enacted, that "any note, memorandum, or writing whatsoever, given to any person for or upon the payment of money, whereby any sum of money, debt, or demand, or any part of any debt or demand, *therein specified*, and amounting to 2*l.* or upwards, shall be expressed or acknowledged to have been *paid, settled, balanced, or otherwise discharged or satisfied*, or which shall import or signify any such acknowledgment, and whether the same shall or shall not be signed with the name of any person, shall be deemed and taken to be *a receipt for a sum of money* of equal amount with the sum, debt, or demand, so expressed or acknowledged to have been paid, settled, balanced, or otherwise discharged or satisfied, within the intent and meaning of this schedule, and shall be charged with a duty accordingly; and any receipt, discharge, note, memorandum, or writing whatever, given to any person for or upon the payment of money, which shall contain, import, or signify any *general* acknowledgment of any debt, account, claim, or demand, debts, accounts, claims, or demands, *whereof the amount shall not be therein specified*, having been paid, settled, balanced, or otherwise discharged or satisfied, or

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whereby any sum of money therein mentioned shall be acknowledged to be received *in full*, or in discharge or satisfaction of any such debt, account, claim, or demand, debts, accounts, claims, or demands, and whether the same shall or shall not be signed with the name of any person, shall be deemed and taken to be *a receipt for the sum of* 1,000*l.* *or upwards*, within the intent and meaning of this schedule, and shall be charged with the duty of 10*s.* accordingly." This paper clearly imports an acknowledgment of an account having been settled.

Sir F. Pollock, for the plaintiff.—The highest receipt-stamp is 10*s.*, and this paper bears a higher stamp, and is therefore no injury to the revenue. The portion of the statute, 55 Geo. 3, c. 184, that has been cited, applies to papers that are in themselves really receipts. This is not so, as it contains an agreement to give a receipt, and contemplates some other paper in addition to and subsequent to that which I propose to give in evidence: indeed, this very paper has been received by Lord Langdale at the Rolls.

Lord DENMAN, C. J.—I shall receive the evidence.

The paper was read.

Lord DENMAN, C. J., suggested, that, as the case was entirely matter of account, it should be referred.

The case was referred.

Platt and *Humfrey*, for the plaintiff.

Sir F. Pollock and *Hoggins*, for the defendant.

[Attornies—*Tebbutt*, and *Lake, Wilkinson & Lake.*]

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HODSOLL *v.* STALLBRASS and ANOTHER.

Dec 13*th*.

CASE.—The declaration stated that the defendants kept a dog, well knowing it to be accustomed to bite mankind, and that the dog, on the 21st of March, 1839, bit James Young, the apprentice and servant of the plaintiff, and injured his fingers, whereby James Young was, from time to time till the commencement of this suit, rendered incapable of doing his duty as such servant and apprentice of the plaintiff in his trade of a watchmaker, in the way of which trade J. Y. was apprenticed to the plaintiff by an indenture dated the 9th of July, 1836, from that time till the 1st of August, 1843. The declaration then stated as special damage, that the plaintiff was obliged to hire one William Evans in the stead of the said J. Y., and concluded with the following allegation:—

"And the plaintiff further saith, that by means of the premises the said fingers and hand and arm of the said James Young have become and are permanently crippled and hurt, and rendered unfit for use, and the general health of the said James Young hath become and is greatly injured and impaired, and he the said James Young will never again be capable of working at the said trade and business of a watchmaker, as he otherwise might and would have done, and the plaintiff will thereby lose all the benefit and advantage which he might and would otherwise have received and acquired from the future service and assistance of the said James Young, as such servant and apprentice as aforesaid, from thenceforth until the end and expiration of his said apprenticeship; and he, the plaintiff, having in and by the said indenture of apprenticeship covenanted and agreed to find, provide, and allow unto the said James Young, his said servant and apprentice, competent and sufficient meat, drink, and apparel, lodging, washing, and all other things necessary and fit for an apprentice during all the term aforesaid, and will remain

In an action by the master of an apprentice for an injury done to him per quod servitium amisit, the declaration alleged as special damage, that the apprentice was permanently injured, and could never again be capable of serving the plaintiff as his apprentice during the remainder of the term:—*Held*, that the jury might award damages for the loss of the master up to the end of the term, by reason of the permanent injury of the apprentice, and that they were not limited to give damages for the loss of the master up to the time of the commencement of the action only.

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liable so to do until the end and expiration of the said term, notwithstanding he may hereafter receive little or no benefit from the service and assistance of the said James Young, as such servant and apprentice as aforesaid, in his the plaintiff's said trade and business, in consequence of the wounds and injuries aforesaid, occasioned as aforesaid; and he, the plaintiff, hath been and is by means of the premises aforesaid otherwise greatly injured and damnified, to the plaintiff's damage," &c.

Plea, a payment into Court of 10*l.*, and that the plaintiff had sustained no greater damages.

Replication, that the plaintiff had sustained greater damages.

The facts of the case were proved, and it appeared that the plaintiff's apprentice, James Young, had had the end of one of his fingers bitten off by the defendant's dog, which rendered him permanently unable to do some parts of the watchmaking business that he had before that time been able to do.

Erle, for the defendant.—I submit that the plaintiff cannot recover for any injury sustained by him for the loss of the service of his apprentice after the time of the bringing of the action. His right of action arises from the injury that he has received, and he is therefore not entitled to recover for any prospective damage.

J. Jervis, for the plaintiff.—The loss of the service of the plaintiff's apprentice, caused by the wrongful act or wrongful negligence of the defendants, gives the plaintiff a right of action, and it is mercy to him that all the damages should be recovered in one action instead of having a fresh action, from time to time, till the end of the apprenticeship; and if the plaintiff has a cause of action in this case, the jury have a right to consider the whole extent of the injury sustained.

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Lord DENMAN, C. J.—I think that under this declaration the plaintiff may recover a compensation for the damage he sustains by the permanent injury of his apprentice to the end of his apprenticeship.

Erle, for the defendant, asked, that to save expense the jury might assess the damages separately for the permanent injury done to the apprentice.

Lord DENMAN, C. J.—I see no objection to that.

Verdict for the plaintiff, the jury finding that 20*l.* was the amount of the damages to the plaintiff from the permanent injury to the apprentice, and that the sum paid into Court was sufficient for the damages up to the time of the commencement of the action.

Lord DENMAN, C. J., gave leave to move to enter a verdict for the defendant, in case the Court should be of opinion that the plaintiff could not recover for any damage later than the commencement of the action.

J. Jervis and *Barstow*, for the plaintiff.

Erle and *Butt*, for the defendant.

[Attornies—*Jewitt*, and *Finch & S.*]

In the ensuing term *Erle* applied, in pursuance of the leave given, for a rule to shew cause why a verdict should not be entered for the defendant; but the Court refused a rule.

See *Ongram* v. *Lawson*, post.

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Dec. 14*th.*

BELL, Gent., one &c., *v.* FRANCIS and Others.

DEBT for work done.—Plea, never indebted.

It was opened by *R. V. Richards,* for the plaintiff, that the defendants were sued as the Directors of the London United Trades' Bank, for money due to the plaintiff as their solicitor—in preparing their deed of partnership, and for other business.

On the part of the plaintiff, *R. V. Richards* called for the production of the minute-books of the directors.

Thesiger, for the defendant, declined to produce them.

To trace the books to the possession of the directors, Mr. Edgehill, the late secretary to the Company, was called; he said, "The account-books were kept in my desk, at the office of the Company. I last saw the books there on the 26th of August last. Mr. Thompson, one of the defendants, was then a director. I have not seen the books since they were taken out of my possession in consequence of a dispute; and I, on the 26th of August last, placed the key of the desk in which the books were contained in the hands of the manager of the Company, who acted for the directors.

Thesiger.—Does your Lordship think that this is enough to let in secondary evidence of the books?

Lord DENMAN, C. J.—I think that it sufficiently traces them to you.

It appeared that the plaintiff was appointed in Decem-

In an action against the directors of an intended company, it was proved, (in order to let in secondary evidence of their minute-books, called for under a notice to produce), that four months before the trial, the late secretary had the books in a desk at the office of the Company, and that he then gave up the key of the desk to the manager of the Company, who acted for the directors:—*Held,* sufficient.

In an action by the solicitor of an intended company for preparing their co-partnership deed, a person may be liable without being one of the directors. The persons who are directors are liable, and other persons may be liable also, if they interfere in the management, and hold themselves out as persons giving the order; and in such a case the question will be, whether such persons as were not directors so acted as to become employers of the solicitors in preparing the deed.

ber, 1837, to be solicitor to the Company by a resolution of the then directors, and that he was to attend all meetings of the directors, &c., and be paid 350*l.* a year besides his legal charges. It further appeared that the deed was prepared by the plaintiff in December, 1838, but that the defendant Francis did not become a director till the 1st of March, 1839.

Lord DENMAN, C. J.—In cases of this kind, a person *may* be liable without being a director.

It was further proved by Mr: Jamieson, the manager of the Company, that at a meeting of the Company on the 20th of December, 1838, at which the defendant Francis was present, the draft of the deed was produced, and its clauses discussed; and that the defendant Francis took a part in suggesting alterations in the draft.

Lord DENMAN, C. J.—The question is, whether the defendant Francis so acted before he became a director as to become one of the employers of the plaintiff in preparing this deed. Where persons become directors in one of these proposed companies, they make themselves liable, and other persons may do so if they interfere in the management, and hold themselves out as persons giving the order.

Verdict for the defendant.

R. V. Richards, and *Mansel*, for the plaintiff.

Thesiger, and *W. H. Watson*, for the defendant.

[Attornies—*J. Bell*, and *Curling*.]

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BEFORE LORD DENMAN, C. J.

LYONS *v.* DE PASS and Another.

Dec. 17*th.*

A sale of goods, being those in which he usually deals, made to a tradesman in his warehouse or shop, in the city of London, is a sale in market overt, notwithstanding the construction of the premises be such, that a person from the outside cannot see what is going on within.

TROVER for a quantity of slippers.—Pleas, 1st, not guilty; and 2nd, that at the time when &c. the plaintiff was not possessed of the goods and chattels in the declaration mentioned, or of either of them, or of any part thereof, as of his own property, in manner and form as he had alleged.

It appeared that the slippers in question had got into the possession of the defendants under the following circumstances. On the 4th of March a person named Fuller went to the house of the plaintiff, and told him he had got an order for fifteen dozen pair of slippers to sell; the plaintiff asked him at what price, and being told 15*s.* 6*d.* a dozen, agreed that he should sell them, and have the odd 6*d.* a dozen for his trouble in doing so. Fuller wished the plaintiff to intrust him with the goods, but the plaintiff declined, saying he would not trust his property to any body: upon which Fuller said, "Well, you shall go with me *to the warehouse.*" Upon this the goods were packed up, and the plaintiff, Fuller, and a porter who carried the goods, went together to the premises of the defendants, in Cateaton Street, in the City of London. When they arrived there, Fuller told the plaintiff to stay at the door, that he might not spoil his custom; accordingly the prisoner and the porter only went *inside the warehouse.* The porter immediately came out and went away; Fuller, having remained in about a quarter of an hour, made his appearance, upon which the plaintiff asked him for his money. He replied, "The gentleman has not paid me yet; he has ordered four dozen ladies' slippers more; I will give you a cheque for the whole amount." While they were walking along together, Fuller suddenly ran away from

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the plaintiff, and was not seen till several days after, when the plaintiff, meeting him in the street, seized him and demanded his money; but he got away again, and had the effrontery to summon the plaintiff before the Lord Mayor for assaulting him in the street. However, upon the matter being explained, the Lord Mayor committed Fuller on a charge of feloniously obtaining the slippers, and he was subsequently tried and convicted, and sentenced to be transported for seven years.

One of the defendants was examined as a witness at the trial, on the part of the prosecutor, and gave his evidence as follows:—"I live in Cateaton Street; the prisoner came to me on the 4th of March, about 10 o'clock in the morning, to know if we could buy a lot of jobslippers, about 14*s*. a dozen. We told him he might bring them, but we had not seen a sample of them; he called again about an hour after with sixteen dozen, and said, 'Here are the slippers;' he said there were only fifteen dozen. We gave him 12*s*. a dozen for the men's and less for the other, 9*l*. 4*s*. altogether, and gave him a cheque for the amount; he said he had them on commission from a person who wanted money. We did not give him an order for four dozen more."

The slippers having been resold by the defendants, were not produced at the trial at the Central Court, and therefore the Court could not make an order for their restitution under the statute (*a*).

An examined copy of the record of Fuller's conviction at the Central Criminal Court was put in (*b*), and the

(*a*) 7 & 8 Geo. 4, c. 29, s. 57.

(*b*) It was necessary for the plaintiff to prosecute the thief; if he had not done so, he could not have maintained the action of trover, not as it seems on the ground mentioned by Lord *Kenyon* in *Howard* v. *Smith*, 2 T. R. 755, that during the interval between the felony and the conviction, *the property remains in dubio*, but for the reason mentioned by the Court of King's Bench, in *Peer* v *Humfrey*, 2 Ad. & E. 495, and 4 Nev. & Man. 484. See *Gimson* v. *Woodfull*, Vol. 2 of these Reports, p. 41, and 1 Hale's P C. c. 47, p. 538, where it is said—"A. steals the goods, viz.

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short-hand writer of that Court proved from his notes the evidence given by the defendant as above stated. A witness was also called, who proved that he applied to one of the defendants, on the part of the plaintiff, for a settlement, and was told by him that they would give the plaintiff 3*l.*, if he would take it, but not a farthing more. This the plaintiff declined.

Sir *F. Pollock*, for the defendants, relied on two grounds of defence:—first, that there had been a sale in market overt, which passed the property to them; and, secondly, that the sale was a bonâ fide sale, made by the authority of the plaintiff, to whom the goods belonged.

Lord DENMAN inquired of *Platt*, who led for the plaintiff, what was his answer to the objection that there had been a sale in market overt.

Platt replied, that it was not, in point of law, a sale in market overt.

Lord DENMAN, C. J., in summing up, said—This is an action of trover, brought to recover the value of a quantity of slippers, which the defendants purchased of a person named Fuller, who was afterwards prosecuted by the plaintiff, and convicted of having stolen them from him. It is said that Fuller got possession of the goods by a trick; and, if so, it seems to me that the property did not pass by the mere fact of his selling them to the defendants. It seems to me that the plaintiff's conduct will not affect the question of whether the goods were stolen or not (*a*). You

50*l.* in money, of B., is convicted, and hath his clergy upon the prosecution of B. B. brings trover for the 50*l.* adjudged for the plaintiff, because now the plaintiff hath prosecuted the law against him, and no mischief to the Commonwealth; but, before prosecution, trover lies not, for so felonies would be healed."

(*a*) Leave was given to Sir *F. Pollock* to argue this point in shewing cause, if the Court should grant a rule upon the other.

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will find your verdict for the plaintiff, unless you think there was a sale in market overt; for such a sale cures a felony. It is for you to say, under all the circumstances of the case, whether this was a sale in market overt. The defendants are not charged with receiving the goods knowing them to have been stolen; but merely with receiving them from Fuller while they were the property of the plaintiff (*a*). The property did not pass unless there was a sale in market overt. If you think there was such sale, you will find your verdict for the defendants; if you think there was not, then you will find for the plaintiff.

Verdict for the defendants, with leave to enter a verdict for the plaintiff for 9*l.* 4*s.*, the sum paid for the slippers, if the Court of Queen's Bench should be of opinion that, under the circumstances, the sale was not in law a sale in market overt.

Platt, Payne, and *Pashley,* for the plaintiff.

Sir *F. Pollock,* and *W. H. Watson,* for the defendants.

[Attornies—*H. Hart,* and *Billing.*]

BEFORE LORD DENMAN, C. J.; LITTLEDALE, J.; AND COLERIDGE, J.

1840.

Jan. 14*th.*

IN the ensuing Hilary Term, *Payne* (*b*) moved, pursuant to the leave given at the trial. He contended that the sale was not a legal sale in market overt upon two grounds: first, on account of the nature of the place in which the sale took place, viz. a *warehouse,* and not an *open shop;* and, secondly, on account of the character of the pur-

(*a*) In Coke's 2nd Instit. p. 713, it is said—"If they be sold *of covin* between two of purpose to bar him that hath right, this barreth not."

(*b*) *Platt* was absent, from indisposition.

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chaser, he not having been shewn to be a freeman of London. On the first point he referred to Comyn's Dig., title *Market* E, in which (after the statement that a sale in an *open shop* in London of proper goods is a sale in market overt, and changes the property) it is said, "A sale in a *covert place* within a fair or market, does not change the property, as in a *back room or warehouse*, or behind a hanging or cupboard, *where a man passing before the shop cannot see*, or where the windows of the shop are shut." He also referred to the case of *Taylor* v. *Chambers* (*a*) as an

(*a*) Cro. Jac. 68. That was an action of trover for a silk quilt, a tester of a bed, five silk curtains, a petticoat, and a cloak. The defendant pleaded not guilty to all but the petticoat and cloak, and as to them he pleaded that the city of London is an ancient city, and there is a market there *in every open shop* on every day besides Sundays and Holidays from sunrise to sunset, so that one of the contractors is a freeman, and that he, being a freeman of the Company of Mercers, bought those things in his open shop. To this plea the plaintiff demurred, and the Court held that it was not good. "For," said they, "the custom is too general that every freeman might buy all manner of wares in every shop &c., for then a scrivener might buy plate in his shop and the like, &c., which is not reasonable. And here he, being of the mystery of mercers, to buy petticoats and cloaks &c., it is not agreeable to his trade." And *Popham* said, that it had been resolved that such custom, being found by a special verdict, was unreasonable; wherefore it was adjudged for the plaintiff.

In *Palmer* v. *Wolley*, Cro. Eliz. 454, it is said that a draper's shop is not market overt for the purchase of plate; "and so if the sale be in *a back shop, or in another place not open*, no property shall be changed by such sale."

Also in the case of market overt, 5 Coke, 83 b, before referred to, it is said that the sale of stolen plate in a goldsmith's shop in London vests the property if the plate be *sold openly;* but that if the sale be in the shop of a goldsmith, either behind a hanging or behind a cupboard, upon which his plate stands, so that one who stood or passed by the shop could not see it, it would not change the property; and so if the sale be not in the shop, but in the warehouse or other place of the house, it would not change the property. In Hale's P. C. c. 47, his Lordship, speaking of restitution, says—"1st. This act was made to encourage persons robbed to pursue malefactors, and therefore they have an assurance of restitution; and it would be small encouragement, if a thief by sale in market overt, which is every day in almost every shop in London, should elude it.

authority to shew that the shop must be an open shop, and that one of the contracting parties, at least, must be a freeman; and he argued, that, in addition to the fact of the place in question *being called a warehouse*, it was evident that it was in fact a covert place into which a person could not see from without, or the plaintiff would have been able to see in, and the fraud would not have been committed upon him. He relied also upon the fact of there being no modern case in the books on the subject of a sale in a London warehouse being a sale in market overt, as strongly tending to shew that, with the change in the construction of the premises, the privilege was altogether lost; on the principle that the reason ceasing the thing itself ceases, and according to the maxim, "debile fundamentum fallit opus." He further submitted, that if, notwithstanding such change, the privilege were held to exist, it would open a door to the disposal of stolen property to a very great and fearful extent. Under all these circumstances, he urged upon their Lordships the propriety of granting a rule that the question, which he considered as of much importance, might be fully and solemnly argued.

Lord DENMAN, C. J., said, that with respect to the nature of the premises in which the sale took place reference was

"2nd. It were against the common good, and would encourage offenders to the common detriment, if this sale should conclude the owner.

"3rd. The man that is robbed is robbed against his will, and cannot help it; but the buyer of stolen goods may choose whether he will buy, or if he buy, may yet refuse to buy unless well secured of the property of the goods, or knowing the owner." He goes on to state that there is no authority, but it is only gratis dictum, that sale in market overt barred restitution on appeal, and cites as authorities contra, the following:—"1st. It hath been the constant practice at Newgate that sale in market overt hath not been allowed against this writ of restitution, and this Mr. Lee, Secondary there for above thirty years, hath attested openly. 2nd. Lord *Coke* says on the stat. 21 Hen. 8, c. 11, "the party robbed or owner shall have restitution notwithstanding any sale in market overt, and with this agreed myself and Justice *Twisden* upon consideration of this statute."

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made at the trial on both sides to the knowledge of the jury, and they had found the fact that it was market overt; and with respect to the objection that the purchaser should be a freeman, no question was raised on that ground at Nisi Prius.

LITTLEDALE, J.—After referring to the case of market overt in 5 Coke 83 b, in which it is stated that every shop in London is market overt for such things only as, according to the trade of the owner, are put there for sale, said that in his opinion the circumstance of the alteration in the shops of London, in which glazed windows were substituted for open fronts, did not render a sale in such shops less a sale in market overt than it would have been if they had continued in their former state.

COLERIDGE, J., said, that if the argument used with reference to the alteration in the construction of the buildings were to prevail to the extent to which it had been pressed, it would have the effect of destroying the custom altogether, and preventing there being any sale in market overt in a shop in London. His Lordship added, that in his opinion it would be productive of so much mischief to have the law on the subject questioned, that he could not consent to grant any rule upon the subject.

Rule refused.

OXFORD SUMMER CIRCUIT, 1839.

BEFORE MR. BARON ALDERSON AND MR. JUSTICE WILLIAMS.

BERKSHIRE ASSIZES.

(Civil Side.)

BEFORE MR. BARON ALDERSON.

SELWOOD *v.* MOUNT, Esq., and OTHERS.

TRESPASS, for entering the plaintiff's house and close, and taking his goods. Plea—Not guilty.

Magistrates having convicted a party under the Highway Act, they drew up a conviction and returned it to the clerk of the peace, and on an action being brought against them, they put in the conviction returned to the clerk of the peace, (which was open to some formal objections), and also another conviction drawn up afterwards in a more formal shape: —*Semble*, that there is no impropriety in this course of proceeding, provided the latter conviction is according to the truth and supported by the facts of the case.

Semble, that, on deciding a case, magistrates ought not to take an indemnity, as it has the effect of enabling them to decide more safely in favour of a party who is able to give an indemnity, than of one who cannot do so.

It was opened by *Whateley*, for the plaintiff, that the plaintiff had applied to two magistrates, under the stat. 5 & 6 Will. 4, c. 50, (the Highway Act), s. 84 (*a*), to cause a footpath to be stopped up, as useless: and that they having, under sec. 85 of the act, certified that it was so, Mr. Williams, of East Ilsley, had, under sec. 88 of the act, appealed against their certificate; and on the trial of that appeal at the Quarter Sessions at Abingdon, on the 3rd of July, 1838, the jury found that the footpath was not useless; and the Quarter Sessions ordered that the costs of the appeal should be paid by the respondent. As the order was originally drawn up, no respondent's

(*a*) The sections of the Highway Act referred to in this case will be found in Burn's Justice, Tit. Highways.

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name was mentioned, though the plaintiff's name was afterwards inserted (as he submitted) improperly, by the direction of the chairman. However, the Sessions did not ascertain the amount of costs, and therefore their order was, on that point, inoperative. After this Mr. Williams went before Mr. Mount and Mr. Bunny, two of the defendants, who were magistrates, and they granted a warrant of distress to levy 112*l.* 0*s.* 4*d.* as the amount of these costs, on the plaintiff's goods, which warrant was executed by the defendant Law, who was the constable. He submitted, that as the Quarter Sessions had not ascertained the amount of costs, the defendants, Mr. Mount and Mr. Bunny, had no authority to issue any warrant. They, however, were mere nominal defendants, as Mr. Williams had given them an indemnity.

The taking of the goods was proved, and the counsel of the defendant Law, put in the warrant of distress, which the defendant Law, had notice to produce. The order of Sessions for the payment of the costs was also put in, and did not specify any sum. The indemnity given by Mr. Williams to Mr. Mount and Mr. Bunny was also put in.

ALDERSON, B.—Magistrates ought not, I think, to take an indemnity. It is a bad practice, as it has the effect of enabling them more safely to decide in favour of a party who is able to give an indemnity, than of one who cannot do so.

Ludlow, Serjt., for the defendants, Mount and Bunny.—By the 90th sect. of the stat. 5 & 6 Will. 4, c. 50, the Quarter Sessions are bound to order the costs to the successful party, on an appeal of this kind; and that being so, I submit that the magistrates, by whom the payment of them is to be enforced under the 103rd section, may ascertain the amount; and that, at all events, even if this

is not so, the plaintiff should have made this his defence when summoned before Mr. Mount and Mr. Bunny; instead of which, he never either appeared to their summons, or made any defence or objection before them, till a warrant of distress is granted, and then brings his action. I submit, that as the magistrates had jurisdiction over the subject-matter, their conviction is a bar to the present action; and his remedy, if any, was by appeal under the 105th section. I ought to mention also, that a conviction was returned by the magistrates to the Quarter Sessions, and that that conviction is open to some objections. Since that the magistrates have drawn up another conviction, which is free from those objections. I submit that they are right in doing so. It has long been the practice for magistrates not to draw up their convictions at the time. If the conviction returned to the Sessions is good, *cadet questio*; and if it is not, it is a nullity, and nothing at all; and the magistrates are then in the same situation as if no conviction had ever been returned to the Sessions.

ALDERSON, B.—I do not see any impropriety in the magistrates drawing up another conviction in a more formal shape, provided that the latter is according to the truth, and supported by the facts of the case.

Both the convictions were put in, and the learned Baron being of opinion that they were in point of law no answer to the action, there was a

Verdict for the plaintiff against the defendants Mount and Bunny, and for the defendant Law.

Whateley, *Tyrwhitt*, and *J. Jeffreys Williams*, for the plaintiff.

Ludlow and *Talfourd*, Serjts., and *Carrington*, for the defendants Mount and Bunny.

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Walesby, for the defendant Law.

[Attornies—*F. Crowdy* for the plaintiff, and *F. Graham* for the magistrates; *Badcock* for the constable.]

In the ensuing term, *Ludlow*, Serjt., applied to the Court of Queen's Bench for a new trial, on the ground that the facts before stated were a good defence for the magistrates. The Court granted a rule to shew cause.

WORCESTER ASSIZES.

(*Crown Side.*)

BEFORE MR. BARON ALDERSON.

If one of the Grand Jurors be a Quaker, the indictments should commence, "The Jurors for our Lady the Queen upon their oath and affirmation present," &c.

ON the Grand Jury being called, one of them, Josiah King, Esq., (who was stated to be one of the Society of Friends), made his affirmation (*a*).

ALDERSON, B., directed that all the indictments should commence "The jurors for our Lady the Queen, upon their oath and affirmation, present that &c."

(*a*) By the stat. 3 & 4 Will. 4, c. 49, s. 1, it is enacted, "That every person of the persuasion of the people called Quakers, and every Moravian, be permitted to make his or her solemn affirmation or declaration instead of taking an oath *in all places and for all purposes* whatsoever where an oath is or shall be required, either by the common law or by any act of Parliament already made or hereafter to be made, which said affirmation or declaration shall be of the same force and effect as if he or she had taken an oath in the usual form."

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REGINA *v.* SANDERS.

INDICTMENTS on the stat. 7 & 8 Geo. 4, c. 29, s. 15, and 1 Vict. 90 (*a*), for breaking into the shop of William Ramsdell and stealing coals therein.

A shop to be within the stat. 7 & 8 Geo. 4, c. 29, s. 15, & 1 Vict. 90, (as to breaking into shops), must be a shop for the sale of goods, and a mere workshop will not be sufficient.

It appeared that the prosecutor sold coal, and was also a blacksmith, and that the place from which the coal was stolen was a shop, to which persons went who bought it, it being a room beyond the prosecutor's blacksmith's shop.

ALDERSON, B.—To come within the provisions of these acts of Parliament the place must be more than a mere workshop, it must be a shop for the sale of articles; a workshop, such as a carpenter's shop or a blacksmith's shop, would not, I think, be within the Acts.

Verdict—Guilty.

W. J. Alexander, for the prosecution.

[Attorney—*Robeson.*]

(*a*) By which it is enacted, "that if any person shall break and enter any shop, warehouse, or counting-house, and steal any chattel, money, or valuable security," every such offender is liable to be transported for life &c. But now, by the stat. 1 Vict. c. 90, the punishment is reduced to transportation for any term not exceeding fifteen years, or less than ten years, or imprisonment not exceeding three years, to which hard labour and solitary confinement may be added.

REGINA *v.* LEDDINGTON.

THE indictment charged that Ann Burton murdered herself by poisoning herself with arsenic, and that the prisoner did feloniously incite and procure the said Ann Burton the said felony and murder to do and commit.

A person cannot be tried for inciting another to commit suicide, although that other commit the suicide.

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ALDERSON, B.—(To the jury.)—You have no authority to inquire into this charge; this is a case of suicide, and the prisoner is charged with inciting it; that is a case that by law we cannot try. The prisoner must be acquitted (*a*).

Verdict—Not guilty.

Domville and *Huddleston*, for the prosecution.

W. H. Cooke, for the prisoner.

[Attornies—*Daniel*, and *Rogers*.]

(*a*) In the case of *Rex* v. *Russell*, M. C. C. 356, it was held by the fifteen Judges, that an accessary before the fact to the crime of self-murder was not triable at common law, because the principal could not be tried, and that he is not now triable for a substantive felony under the stat. 7 Geo. 4, c. 64, s. 9, as that statute was to be considered as extending to those persons only who, before the statute, were liable either with or after the principal, and not to make those liable who before could never have been tried. And it was also held, that if a woman takes poison with intent to procure a miscarriage, and dies of it, she is guilty of self-murder, whether she was quick with child or not, and that the person who furnished her with the poison for that purpose will, if absent when she took it, be an accessary before the fact only.

STAFFORD ASSIZES.

BEFORE MR. BARON ALDERSON.

REGINA *v.* ORGILL.

In Ireland the marriage of two Roman Catholics by a Roman Catholic priest is good; and if a person at the time of such marriage declares himself to be a Roman Catholic, and the woman be a Roman Catholic, this is a good marriage as against him; and if he be afterwards tried for bigamy on this marriage, (he having been before married to another wife who was still alive), he will not be allowed to set up his supposed Protestantism as a defence to the charge.

BIGAMY.—The prisoner was indicted for marrying Ellen Nagle, his former wife Ann Orgill being alive.

To prove such a marriage, evidence was given that the Rev. W. O'S. (who officiated) acted as a Roman Catholic priest, and that the marriage (as was usual) took place at his house, and he asked the parties if they were Roman Catholics, and that they said they were so; that part of the ceremony was in English and part in Latin, and that having asked the man if he would take the woman as his wife, and the woman if she would take the man as her husband, and each having answered in the affirmative, he pronounced them married:—*Held*, sufficient.

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REGINA v. ONGILL.

It was opened by *Carrington*, for the prosecution, that the first marriage took place at Burton-on-Trent on the 27th of July, 1827, and the second at the house of the Rev. W. O'Sullivan, a Roman Catholic priest at Cork; Ellen Nagle being a Roman Catholic, and the prisoner, in answer to a question put by the priest immediately before the second marriage, stating that he was a Catholic also. He submitted that a marriage of two Catholics in Ireland by a Roman Catholic priest was a valid marriage, and that if the prisoner declared himself to be a Roman Catholic he could not be permitted now to say that he was not. He cited the cases of *Rex* v. *Hanley* (*a*); and Dr. *Browne's* Irish Ecclesiastical Law (*b*).

(*a*) Cited Carrington's Supp. 254. In that case, which was tried at the Ennis Assizes, 1815, before the Lord Chief Baron *O'Grady*, for bigamy, in 1806, the prisoner was married by a Catholic priest to his first wife who was an Irish Catholic, the prisoner *stating that he was a Catholic*. In 1815, he married his second wife, he then passing for a Protestant. This marriage was celebrated by a clergyman of the Established Church. The prisoner's counsel contended, that as the prisoner was in fact a Protestant at the time of the first marriage, it was void, as every marriage of a Catholic and a Protestant by a Catholic priest would be, and witnesses were called to shew that up to the time of the first marriage the prisoner always went to church and was considered a Protestant. The Lord Chief Baron said that the law was correctly stated by the prisoner's counsel, and left it to the jury to say whether they did not consider the prisoner to be a Catholic at the time of the first marriage. The jury found that he was so, and convicted him. *Rex* v. *Hanley*, (MS.), 1815.

(*b*) "In cases of marriage by license in Ireland, security must be given that there is not any impediment or suit depending; that the consent of parents or guardians (when required) has been obtained; and that the marriage shall be in the parish church or chapel where one of the parties dwells, between the hours of eight and twelve in the forenoon. Two persons must swear to the consent, and one of the parties that there is no impediment. The parishes of their abode must be mentioned in the license, and ministers marrying without banns or license, or at improper hours, may be deprived if beneficed, or degraded if not. In Ireland none of these requisites are *essential* to the validity of the marriage except that it should be celebrated by a person in holy orders. But if a marriage be celebrated in Ireland by a person *not in holy orders*, it is void. Browne's Irish Ecc. Law,

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ALDERSON, B.—If at the time of the second marriage the prisoner declared himself to be a Roman Catholic, it is a good marriage as against him. The law on this subject was much considered by the Privy Council in the case of *Swift* v. *Swift*. If the prisoner at the time of his marriage held himself out to be a Roman Catholic, I am decidedly of opinion that he cannot now set up his protestation as a defence to this charge.

The first marriage at Burton-upon-Trent was proved by the production of the original parish register, and the evidence of the parish clerk who was present at it. To prove the second marriage Ellen Nagle was called: she stated that the Rev. W. O'Sullivan acted as a Roman Catholic priest, and that the marriage took place at his house, as was usual with the marriages of Roman Catholics in Ireland. She stated that before the commencement of the marriage-service Mr. O'Sullivan asked the prisoner if he was a Roman Catholic, and that he said that he was so. She also stated that a part of the ceremony was in Latin and the remainder in English, and that the priest having asked the prisoner if he would take the witness as his wife, and having asked the witness if she would take the prisoner for her husband, and each having answered in the affirmative he pronounced them married.

Evidence was also given that the first wife was alive, and that the prisoner was apprehended in the county of Stafford.

ALDERSON, B., (in summing up), told the jury, that if they believed the evidence of Ellen Nagle the marriage in Ireland was sufficiently proved, and that there was no doubt as to the other parts of the case.

Verdict—Guilty.

266. (Dr. Browne was Professor of Civil Law in the University of Dublin, and a member of the Irish Parliament).

Godson and *Carrington*, for the prosecution.

Price, for the prisoner.

[Attornies—*Smith*, and *Flewker*.]

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BEFORE MR. JUSTICE WILLIAMS.

REGINA *v.* OWEN, ELLIS, and THOMAS.

Three persons were indicted for a rape, and were also indicted for the murder of the party alleged to be ravished. Before the trial on the indictment for the rape, the counsel for the prosecution asked to have one of the prisoners acquitted, that he might call him as a witness against the others. This was opposed by the prisoners' counsel:—*Held*, that in cases of this kind the Court will, if it sees no cause to the contrary, intrust it to the discretion of the counsel for the prosecution to determine whether he will have a prisoner acquitted before the trial commences to enable him to call such prisoner as a witness against the other prisoners.

On the trial of the indictment for the rape, it was proposed to put in the depositions of each of the prisoners taken on oath at the inquest held on the party alleged to have been ravished. It appeared that each of the prisoners was in custody at the inquest; that no inducement to confess was held out, and that each was asked if he wished to make a statement, and said that he did. The Judge received the statements in evidence, but said he would reserve the point if it should become necessary.

The prisoners being acquitted of the rape, the counsel for the prosecution moved to put off the trial for the murder till it could be ascertained whether the Crown would pardon a person convicted of bigamy, to whom it was alleged that one of the prisoners had made an important statement. The Judge postponed the trial, and would not admit the prisoners to bail.

RAPE.—The 1st count of the indictment charged the prisoner Owen with having ravished Christina the wife of Robert Collins, and the other prisoners with having aided him in so doing; in the 2nd count the prisoner Thomas was charged as principal, and the other two prisoners as aiders; and in the 3rd count the prisoner Ellis was charged as the principal, and the other two as aiders.

As soon as the jury were sworn, *Ludlow*, Serjt., for the prosecution, asked that the prisoner Owen should be acquitted before the case was gone into, as he proposed to examine Owen as a witness against the other prisoners.

Godson, *E. Yardley*, and *Beadon*, for the respective prisoners, objected that the prisoner Owen ought not to be made a witness after the grand jury had returned a true bill against him.

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WILLIAMS, J.—I have very little doubt in this matter; but as this is a case of importance, I will confer with my brother Alderson on the point.

His Lordship having conferred with Alderson, B., said, "I had little doubt as to the course I ought to take, and my learned brother entirely agrees with me that this is a matter very much of ordinary occurrence. In cases of this kind the Court, if it sees no cause to the contrary, is in the habit of relying on the discretion of the learned counsel who conduct the prosecution. I shall therefore, in this case, intrust it to the discretion of the learned serjeant to determine whether he will have the prisoner Owen acquitted before the case is gone into or not. I think it almost of course."

It was opened by *Ludlow*, Serjt., that Mrs. Collins had taken her passage from Preston Brook to London on board one of Messrs. Pickford's fly-boats, of which the prisoner Owen was the captain, and the other two prisoners the hands: and the learned Serjeant opened a great deal of evidence, from which it was sought to be inferred that Mrs. Collins had been ravished by the prisoners while she was on board the fly-boat, and had afterwards been drowned by them in the canal at a place near Fazeley. At the conclusion of his opening *Ludlow*, Serjt., asked the prisoner Owen whether, if he were then acquitted, he was willing to give evidence.

The prisoner Owen said that he was not, and the trial proceeded as against him as well as the other prisoners.

On the part of the prosecution Mr. Fowke, the coroner, who held the inquest on the body of Mrs. Collins, was called. He said, "At the inquest the prisoner Owen made four statements; he had been sworn before he made each statement. Each of the statements was taken down in

writing by me, and signed by him. The prisoner Ellis made and signed a statement, and so did the prisoner Thomas; they were sworn before the statements were made. No inducement of any kind was held out to either of the prisoners to make any statement, neither threat nor promise; they were all three brought before me in custody."

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Ludlow, Serjt., proposed to give these statements in evidence.

Godson.—I submit that they are not receivable as they were on oath.

WILLIAMS, J.—I will reserve the point if it should become necessary.

Godson.—I believe that the cases have gone to this, that where the Coroner has examined witnesses who have come voluntarily, their depositions have been afterwards read. These persons were in custody; and in the case of a person named Wheeley, who was tried at Worcester on a charge of having poisoned his wife, Mr. Baron Alderson rejected the deposition of the prisoner, which had been taken at the inquest, because it was on oath, and taken while he was in custody.

WILLIAMS, J.—I know that my brother Alderson did so; but I also know, that since that there has been a re-action in opinion, (if I may be allowed the expression); I shall therefore receive the evidence and reserve the point if it should become necessary.

Mr. Fowke recalled.—"I asked Owen if he was desirous of giving his evidence, and he said, yes: he was sworn and gave evidence. I asked each of the other prisoners if he wished to give evidence, and each said that he did."

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The statements were read.

At the conclusion of the evidence for the prosecution, *Williams*, J., being of opinion that there was no sufficient evidence to call on the prisoners for their defence, directed an acquittal.

Verdict—Not Guilty.

There was another indictment which charged the prisoners with the murder of Mrs. Collins, by drowning her.

Ludlow, Serjt., applied to have the trial of this indictment postponed till the next assizes, on the ground that the prisoner Owen had, while in prison, made an important statement to a person named Orgill, who was at present incompetent to be examined as a witness, as he had been convicted of bigamy. And he made this application that it might be ascertained whether her Majesty would pardon Orgill, that he might become a witness against Owen.

Godson, *E. Yardley*, and *Beadon*, for the prisoners, objected to the postponement of the trial.

WILLIAMS, J.—I think that, under all the circumstances, I ought to postpone the trial.

Godson.—I hope that, if your Lordship postpones the trial, the prisoners may be admitted to bail.

WILLIAMS, J.—In a case of this kind, they must remain in custody till the next assizes; I cannot admit them to bail (*a*).

The prisoners were remanded.

(*a*) See the case *Rex* v. *Chapman*, ante, Vol. 8, p. 558.

Ludlow, Serjt., and *F. V. Lee*, for the prosecution.

Godson, for the prisoner Owen.

E. Yardley, for the prisoner Thomas.

Beadon, for the prisoner Ellis.

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[Attornies—*Homer*, and *Passman*.]

SHROPSHIRE ASSIZES.

(Civil Side.)

BEFORE MR. JUSTICE WILLIAMS.

DAVIES *v.* DAVIES.

ASSUMPSIT.—The first count of the declaration was on a promissory note made by the defendant for 80*l.* payable to the plaintiff or his order on demand, with interest at 4 per cent. There were also counts for work and labour by the plaintiff and his wife, as servants of the defendant, and for money lent, and on an account stated.

Pleas — first, as to all but the promissory note, non assumpsit; second, to the whole declaration a plea of payment; and third, to the whole declaration a plea of set-off for board and lodging of the plaintiff and his wife.

A. and his wife boarded and lodged in the house of B. the brother of A., and both A. and his wife assisted B. in carrying on his business. A. brought an action for the services, to which B. pleaded a set-off for board and lodging:—*Held*, that neither the services on the one hand, nor the board and lodging on the other, could be charged for unless the jury were satisfied that the parties came together on the terms that they were to pay and to be paid; but, that if that were not so, no ex post facto charge could be made on either side.

It was opened by *Talfourd*, Serjt., for the plaintiff.—That the plaintiff and defendant were brothers, and that the promissory note was given by the defendant to the plaintiff for the balance of his share of the effects of their mother, to which the plaintiff was entitled on her death;

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and that, with respect to the charge for services, it would be shewn that the plaintiff had lived with the defendant at his house, which was a public-house, at Sneds Hill, from the 22nd of May, 1837, till the 4th of October in that year, and assisted in the business; and that the plaintiff then married, and from that time till the 4th of November the plaintiff and his wife both lived there, and both of them assisted in the business and in the housekeeping. Against this item the defendant made a claim, by his set-off, for their board and lodging.

WILLIAMS, J.—Neither the services on the one hand, nor the board and lodging on the other, can be charged for, unless the jury are satisfied that there was a contract, express or implied. That is, that the parties came there on the terms that they were to pay and to be paid; but if that was not so, there can be no ex post facto charge made on either side.

The item for services was abandoned on the one side, and the item for board and lodging on the other; and the case proceeded on the plea of payment.

Verdict for the defendant.

Talfourd, Serjt., and *Carrington*, for the plaintiff.

R. V. Richards and *Whateley*, for the defendant.

[Attornies—*Wallington*, and *Stanley & Heane*.]

IN the ensuing term, *Talfourd*, Serjt., applied to the Court of Exchequer for a new trial, on affidavits, and the Court granted a rule, which was afterwards made absolute on payment of costs.

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HEREFORD ASSIZES.

BEFORE MR. BARON ALDERSON.

REGINA *v.* MORRIS.

SECRETING a Will. The indictment was in the following form:

" Herefordshire, } " The Jurors for Our Lady the Queen,
to Wit. } upon their oath present, that John Morris, late of &c., on &c., at &c., a certain will, the same being a testamentary instrument of one Mary Baskerville, then and there being found, unlawfully did take, steal, and carry away, against the form of the statute" &c.

Second count—" That the said J. M. on &c., at &c., a certain other will, the same being a testamentary instrument of the said Mary Baskerville, after the death of the said Mary Baskerville, [then and there being found, unlawfully and for a fraudulent purpose did conceal], against the form of the statute" &c. Third count.—The like, omitting the words between [ ] and inserting the words 'unlawfully and for a fraudulent purpose did destroy.'

Semble, that in an indictment under the stat. 7 & 8 Geo. 4, c. 29, a. 22, for destroying or concealing a will for any fraudulent purpose, the purpose ought to be stated in the indictment.

If a defendant concealed a will, and the money which ought, by the will, to have gone to A. and B., and with it paid the debts of the husband of the next of kin to whom he was a creditor, this would be a fraudulent purpose within the stat. 7 & 8 Geo. 4, c. 29, a. 21.

It was opened by *C. Phillips*, for the prosecution, that Mrs. Baskerville had died in the year 1835, having made her will, by which she left a sum of money to a person named Apperley—the interest of other money to her (Mrs. B.'s) sister, Mrs. Rowland, and after her decease the principal to be divided among Elisha Cooper's children—and that this will was given by Mrs. Baskerville to a nurse, who gave it to Mr. Rowland, the husband of Mrs. Rowland, who put it on a desk, from which it was taken away

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by the defendant; and that, after this, administration was taken out by Mrs. Rowland as sole next of kin of Mrs. Baskerville, and that the defendant, who was the assignee of Mr. Rowland, for the benefit of creditors, paid away the property in making a dividend on Mr. Rowland's debts.

ALDERSON, B.—The words of the Act of Parliament are, "for any fraudulent purpose destroy or conceal any will, codicil, or other testamentary instrument." The purpose ought, I think, to be stated in the indictment, which here it is not(*a*). But I think also that if the defendant concealed this will, and took the money which ought to have gone to Mrs. Apperley and Elisha Cooper's children, to pay Mr. Rowland's debts, that would be a fraudulent purpose within the act of Parliament.

On the part of the prosecution evidence was given with a view of shewing that the defendant took away the will; but the case ultimately turned on the credit the jury gave to some of the most important parts of the evidence.

Verdict—Not guilty.

C. Phillips and *F. V. Lee* for the prosecution.

Talfourd, Serjt., and *Greaves* for the defendant.

[Attornies—*Jennings & Turner*, and *Bodenham*.]

(*a*) It is worthy of consideration whether this objection would be aided after verdict under the stat. 7 Geo. 4, c. 64, s. 21, by which it is enacted, "that where the offence charged has been created by any statute, or subjected to a greater degree of punishment by any statute, or excluded the benefit of clergy by any statute, the indictment or information shall, *after verdict*, be held sufficient to warrant the punishment prescribed by the statute *if it describe the offence in the words of the statute*." If it be within this statute, the objection seems to be only available on demurrer. See on this point the cases of *Rex* v. *Harris*, ante, Vol. 7, p. 429; the case of *Regina* v. *Casper*, post; and the case of *Martin* v. *Regina*, in Error, 3 N. & P. 472.

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THE first count of the indictment stated that the defendants, being seditious and evil-disposed persons, intending to disturb the public peace and to excite discontent and disaffection, and to excite her Majesty's subjects to hatred and contempt of the government and constitution of this realm, heretofore, to wit, on &c., at &c., did conspire &c., together with divers other persons unknown, "unlawfully, maliciously, and seditiously to meet and assemble themselves together, and to cause and procure a great number of other persons unlawfully, maliciously, and seditiously to meet and assemble themselves together with the said H. V., W. E., J. D., & W. A. T., and the other conspirators at N. aforesaid, in the county aforesaid, for the purpose of exciting discontent and disaffection in the minds of the liege subjects of our said Lady the Queen, and for the purpose of moving and exciting the liege subjects of our said Lady the Queen to hatred and contempt of the government and constitution of this realm as by law established."

The second count was similar, but stated as an overt act of the conspiracy that the conspirators assembled at Newport on the 19th of April, 1839, to the number of 2,000 and more, in a menacing manner with offensive weapons, and did cause great terror and alarm to the peaceable and well-disposed subjects of her Majesty.

The third count was in the following form: "And the jurors aforesaid upon their oath aforesaid do further present that the said H. V., W. E., J. D., and W. A. T., being such persons as aforesaid and unlawfully and maliciously

Any meeting assembled under such circumstances as, according to the opinion of rational and firm men, are likely to produce danger to the tranquillity and peace of the neighbourhood, is an unlawful assembly; and in viewing this question, the jury should take into their consideration the hour at which the parties met, and the language used by the persons assembled, and by those who addressed them, and then consider whether firm and rational men, having their families and property there, would have reasonable ground to fear a breach of the peace; as the alarm must not be merely such as would frighten any foolish or timid person, but must be such as would alarm persons of reasonable firmness and courage.

The calling of a witness, whose name is on the back of the indictment for the other side, to cross-examine him, is by no means of course. It is discretionary even in felony, but it is a discretion always exercised, and it seems that the same discretion may well be exercised in misdemeanor.

If persons duly called upon by the magistrates to serve as special constables refuse to do so, the magistrates ought to cause them to be indicted.

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and seditiously intending and devising as aforesaid, heretofore, to wit on &c., with force of arms at &c., unlawfully, maliciously, and seditiously, and in a tumultuous manner, did meet and assemble themselves together with divers other ill-disposed persons whose names are to the jurors aforesaid unknown, to a large number, to wit, to the number of 2,000, in a formidable and menacing manner, in a certain public and open place near to the dwelling-houses of divers liege subjects of our said Lady the Queen, inhabiting therein, for the purpose of raising and exciting discontent and disaffection in the minds of the liege subjects of our said Lady the Queen, and of exciting the said subjects to hatred and contempt of the government and constitution of this realm as by law established, and of moving the said subjects to unlawful and seditious opposition and resistance to the said government and constitution, and being so met and assembled together, for the purpose aforesaid, did then and there unlawfully and tumultuously continue together with the said other ill-disposed persons in such formidable and menacing manner for a long space of time, to wit, for the space of four hours, and did then and there during all such time by loud and seditious speeches, exclamations, and cries, raise and excite such discontent and disaffection as aforesaid, and did thereby, then and there, cause great terror and alarm to divers peaceable and well-disposed subjects of our said Lady the Queen, in contempt" &c., and against the peace &c.

The 4th, 5th, 6th, 7th, 8th, 9th, and 10th counts were exactly similar to the 3rd, except that they each stated a different day.

The 11th count was nearly similar, except that it stated that the 2,000 persons were armed with offensive weapons in addition to stating that they met and assembled in a formidable and menacing manner.

The 12th count stated, that the defendants, "together with divers other evil-disposed persons to the jurors aforesaid unknown, to a great number, to wit, to the number of

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2,000, heretofore, to wit, on &c., with force and arms, at &c., unlawfully and in a tumultuous manner did meet and assemble themselves together, and being so met and assembled together, did then and there unlawfully and tumultuously continue together for a long space of time, to wit, for the space of four hours, near the dwelling-houses of divers liege subjects of our Lady the Queen, inhabiting within the said town, and also in divers streets and common highways, there making loud exclamations, cries, and noises, to the great terror, annoyance, and disturbance of many of the liege peaceable and quiet subjects of our said Lady the Queen, to the great damage" &c., and against the peace &c.

The 13th count was for a riot (*a*).

(*a*) The following is an extract of Mr. Baron *Alderson's* charge to the Grand Jury, delivered at the Monmouth Summer Assizes, 1839:

" There is one case in the calendar as to which it is desirable that I should address you. In that case four persons are charged with having 'on the 19th of April, at Newport, unlawfully met with divers other persons calling themselves chartists, unlawfully intending to disturb the peace of this realm, and to excite discontent, disaffection, and hatred to the government and constitution of the country.' This is a misdemeanor of a serious nature if satisfactorily proved, and it will be for you to say upon the evidence whether these persons have outstepped the line of their duty, and instead of confining themselves to the temperate and proper representation of such grievances which they either endure or think they endure, have constituted themselves into that which in point of law is an unlawful assembly of the people. To ascertain what is an unlawful assembly, it is well that we should see what our best lawyers have laid down with respect to unlawful assemblies. Mr. Serjeant *Hawkins*, one of the best authorities on this subject, [Bk. 1, c. 28, s. 9,] says that 'any meeting whatsoever of great numbers of people, with such circumstances of terror as cannot but endanger the public peace and raise fears and jealousies among the King's subjects, seems properly to be called an unlawful assembly, as where great numbers complaining of a common grievance meet together armed in a warlike manner in order to consult together concerning the most proper means for the recovery of their interests, for no one can foresee what may be the event of such an assembly.' So in Mr. Hunt's case, which was tried at York, and afterwards came before the Court of King's Bench. Mr. Justice *Bayley* (than whom no man was more learned in the

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Talfourd, Serjt.,—In his opening cited the following passages from the summing up of Mr. Justice *Bayley* on

laws, or more enlightened in his views) says, 'If the persons who assemble together say, "We will have what we want, whether it be according to law or not," a meeting for such a purpose, however it may be masked, if it be really for a purpose of that kind, is illegal. If a meeting, from its general appearance, and from all the accompanying circumstances, is calculated to excite terror, alarm, and consternation, it is generally criminal and unlawful.' These are, as I take it, the clear principles of law; an unlawful assembly differing in this respect from a riot, that a riot must go forward to the perpetration of some act which the unlawful assembly is calculated to originate and inspire. Something must be executed in a turbulent manner to constitute a riot; but in these cases it must be some enterprise of a private nature, because if the enterprise be of a general and public nature it savours of high treason, and there is no doubt that if you find these persons assembled together by delegates, dispersed from any central jurisdiction in this kingdom, and those persons, so meeting together, in consequence of a delegation from a central body, commit any act of violence for the purpose of carrying into effect any general political purpose, they run the risk of being charged with high treason, and it is well that they should know that, before they attempt the accomplishment of such a purpose; but it is far better and far more humane, far wiser and far more politic, to stop these things in their early stages—it is far better that the individuals should be stopped before they proceed to outrage and violence, as a small amount of punishment, in the first instance, will probably save a great amount of crime afterwards. I am, therefore, glad to see that the magistracy of this county have interposed in the early stage of the proceeding. You will investigate the circumstances under which the assembly took place—whether the individuals who presided and were present were so by previous concert, or by accidentally having met—and if they met by previous concert, you will inquire whether they have met at unseasonable hours of the night—if they have met under circumstances of violence and danger—if they have been armed with offensive weapons, or used violent language—if they have proposed to set the different classes of society at variance the one with the other, and to put to death any part of her Majesty's subjects; if any, all, or most of these things should appear before you, there will, I think, be little difficulty in saying that an assembly of such persons, under such circumstances, for such purposes, and using such language, is a dangerous one, which cannot be tolerated in a country governed by laws; and it is but doing to others as you would that they should do unto you, to repress meetings of that description; because, what right have any persons to do that which produces terror, inconvenience, and dismay among their fellow-subjects? Let me not, how-

the trial of the case of *Rex* v. *Hunt and Others* at York in the year 1820. "On the subject of unlawful assemblies he would quote the expressions of Mr. Serjt. *Hawkins*, who says, 'any meeting whatsoever of a great number of persons with such circumstances of terror as could not but endanger the public peace, and raise fears and jealousies among the King's subjects, properly constitutes an unlawful assembly;' where, for instance, those numbers, having some grievance to complain of, met armed for the purpose of discussing the best way of ridding themselves of that grievance. This is an unlawful meeting, because under such circumstances no one could say what would be the result of such a meeting."

On the part of the prosecution, the following evidence was given:—

Mr. Thomas Phillips.—I am mayor of Newport. In consequence of information I received on the 19th of March last, I directed the superintendent of police to go to Pentonville, to protect persons and property. At eight

ever, be misunderstood. There is no doubt that the people of this country have a perfect right to meet for the purpose of stating what are, or even what they consider to be, their grievances. That right they always have had, and, I trust, always will have; but in order to transmit that right unimpaired to posterity, it is necessary that it should be regulated by law, and restrained by reason. Therefore, let them meet, if they will, in open day, peaceably and quietly, and they would do wisely when they meet to do so under the sanction of those who are the constituted authorities of the country. To meet under irresponsible presidency, is a dangerous thing; nevertheless, if, when they do meet under that irresponsible presidency, they conduct themselves with peace, tranquillity, and order, they will perhaps lose their time, but nothing else. They will not put other people into alarm, terror, and consternation—they will, probably, in the end, come to the conclusion that they have acted foolishly; but the constitution of this country does not (God be thanked) punish persons who, meaning to do that which is right in a peaceable and orderly manner, are only in error in the views which they have taken on some subject of political interest."

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o'clock in the evening of the 19th of March I went to Pentonville, an open place in the town of Newport, about 100 yards long and 15 wide. It is an oblong space of ground. I found about 300 persons. A stage was erected against the lamp-post, and Mr. Vincent was addressing the meeting. My attention was first called to his description of the system of government under which we lived in this country. He described it as a cannibal and atrocious system. He said he could not call it by any other name, for it doomed men, women, and children to toil in factories in a state approaching to starvation and nakedness, for the sake of increasing the wealth of the aristocracy. He then cited an anecdote, which he said was in Paley, of a flock of industrious pigeons, who were employed in collecting grain, and one overgorged pigeon remained in a corner doing nothing but devouring the produce of the working pigeons. The overgorged pigeon called to its aid other pigeons that did no work, and they drove away the working pigeons from the grain which they had collected, allowing the working pigeons, to whom the grain belonged, nothing but chaff. He said, "Such is the system under which we live—the wealthy classes devour the labour of the working classes, devouring the corn, and leaving them nothing but chaff." He asked if such a system should longer exist, and said a home in a cavern would be preferable to living in such a state as this. He then referred to the People's Charter, and to the snowball of chartism, which was gradually increasing in size. He said they had got near the top of the hill, and he called on the men of Newport to assist in getting the snowball to the top of the hill, and when there they would call on their oppressors to beware, and get out of the way, or the snowball would roll down and crush them. He said their fathers and grandfathers had served in the militia long enough. He said, "If Lord John Russell were to ask me to take a musket, I should say no; for if I am to fight at all, it will be against the oppressors of the people." He said that Magna Charta

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had been obtained by the barons marching against King John, and asked why should the people now be less successful? He said the government contemplated the establishment of a rural police, and added, "If any policeman interferes with you, break his head." He went on to say that, if the people appealed to government, the answer was, "Do not we build beautiful prisons for you?"

On April 19th I had been from home, and returned about eight in the evening. I saw groups of people about, and as it became dark I heard shouting, and on looking out I saw a large crowd. They were shouting and cheering. Myself and the other magistrates published a caution, which was generally circulated.

On the 25th of April there was a meeting. I saw Mr. Edwards. He had a stick, and people followed him. He halted them in front of Mr. Frost's house for a short time, and then went on. This was about seven in the evening, and about eight I went out with the late mayor. I heard shouts, and a crowd passed us. In the front of the crowd were a great many young lads, from 12 to 18 years old; following them were a number of men, arm in arm, to the amount of some hundreds. (The population of Newport is about 12,000). The mob was about 1,000 persons, and the street was crowded by spectators besides. When they approached us they hooted; I understood it to be meant for me. Mr. Edwards was with them. They sang at intervals the line of *Rule Britannia*—"Britons never will be slaves." They came to a stage, and Mr. Edwards said that Mr. Vincent was not come, and proposed that Mr. Dickenson should take the chair. Mr. Edwards said he must go and look after his special constables, and he said to some persons, "Each of you must watch his neighbour." Mr. Dickenson addressed the meeting, and said they had heard a sermon, and been told to fear God and honour the King, and that they did fear God, but the doctrines of the sermon advised honour to a Nero or a Caligula. (A sermon on this text had been preached at the church on the pre-

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vious Sunday). Mr. Vincent came, and was received with much shouting. He said the magistrates had branded their meetings as illegal, but they were perfectly legal. He challenged the magistrates to apprehend him, as there was nothing but a letter of Lord John Russell to make these meetings illegal. He said the magistrates were liars and base insidious knaves. He said, "I understand you to mean that you will have the Charter by the consent of the Government if it may be, but that you will have it." This was responded to by shouts of "Yes." Mr. Vincent compared the constitution to a three-legged stool—the sovereign was a leg, whether useful or not he would not say; the House of Lords another leg, whether useful or not he could not say; the House of Commons was the third; he did not say whether that was useful or not. He said that on the following Tuesday he was going to the Convention, and should inform the convention that the men of Wales would join the men in other places to obtain the Charter. He said that the Convention must go on, as the people were a wall behind them. They would soon triumph over their enemies, and would meet to proclaim one universal jubilee. There was much cheering during the speech. Mr. Dickenson said that they ought to do honour to Mr. Vincent by accompanying him next day to the packet-station. Next day there was a crowd at about one o'clock, opposite Mr. Frost's house. Mr. Phillips, of Whitson, who is a county magistrate, passed in his carriage. He is a magistrate, and active in getting up the yeomanry. The mob groaned at him. At half-past one the crowd moved to the packet-station. Mr. Vincent addressed the crowd from a wall where he was with Mr. Dickenson and Mr. Townsend. Mr. Vincent said, in reference to Mr. Phillips's corps of yeomanry, "If they interfere with you, throw them over the bridge. What fists you have! What legs you have! What feet you have! And your shoes, how thick they are,—and what nails are in them! And if, by chance, you should kick

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one of the fellows, what would become of him?" This speech was received with cheers and laughter. The people were in an excited state. Mr. Vincent further said, "I hear I am to be arrested in Gloucestershire, but they had better take care of what they are are about, for there are many good fellows there who will stand by me!" The packet bell rang, and Mr. Vincent went on board the packet. In my judgment, these meetings were calculated to lead to a breach of the peace, and to injury to persons and property. The meetings caused much alarm.

Cross-examined.—I have not attended many public meetings. I never reported a speech in my life. I heard Mr. Vincent tell the crowd to disperse peaceably, and to keep the peace. He may have said this more than once. There was no breach of the peace, to my knowledge. No riot took place at all. By excitement, I mean a state of mind in which they might easily be induced to commit violence. I have been at a reform meeting; I did not see such excitement there. I did not consider the meetings calculated to alarm till the 19th of March. I did not understand that by telling each man to watch his neighbour he meant they should keep the peace. I did not see any people with bludgeons, nor hear any instigation to break the laws; both those things are stated in the caution. I there stated them from the information I received. I received no personal ill-treatment.

Mr. Morris Morris.—I am a master shoemaker. I was a member of the Working Men's Association. All the defendants were members of it. Meetings were held and speeches made. Mr. Vincent was introduced as a member of the convention and a missionary from that body to agitate the people of Newport and its vicinity. I attended one meeting at which he was present. He made a speech that the people were labouring under difficulties that ought not to exist, and ought to be removed. That they paid half their earnings in taxes direct and indirect, for

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which they received no consideration, and by the members and other persons who were present joining, they should obtain the people's charter, and have a different sort of government, and the abuses removed. He said the Mayor of Newport was a nincompoop. There was a fund called the national rent. I paid what I paid to the treasurer, Mr. Townsend. It was no definite amount. That was raised for the members of the Convention. Mr. Frost was at these meetings. He attended as the delegate of Newport to the Convention, and at first as a member of the association.

Mr. Watkins Richards.—I am harbour-master at Newport. On the 19th of April, in the evening, I saw a crowd. Mr. Edwards was forming them in rank and file to the number of from 60 to 100. Some of them had sticks. They went away, and returned to the number of 700, including all the defendants. They were hallooing and hissing, and the boys singing "Britons never will be slaves." Many had sticks, and some of them had them concealed under their jackets, and end in their trousers pockets; one had a piece of wood seven feet long and two inches diameter. I saw the platform, but could not get near, as near 1000 persons were there. All the defendants were on the platform. I heard Mr. Vincent speak. He spoke of bastiles, poor law commissioners, and destruction of children. The meeting broke up between 10 and 11 o'clock at night. They came in a body to Mr. Frost's, and there cheered and parted. I was alarmed, not for myself personally, but I was alarmed for my family and the general peace of the town.

Mr. Hawkins.—I am an alderman of Newport. On the 19th of April I saw the procession pass four or five abreast. It was calculated to produce alarm and endanger the public peace. I had guns and pistols in my shop. I removed them to my bed-room for security.

Cross-examined.—There is a benefit society in Newport. They walk two and two, but not arm in arm; nor do soldiers.

Henry Webber.—I attended four or five meetings, and saw the procession. They caused alarm to me. I expected a disturbance in the town.

Cross-examined.—I heard hissing and hooting when they passed my door. That alarmed me. There were 3,000 persons in the crowd at the time.

Examined by the learned BARON.—I do not hold any office in the borough. I do not know why they hissed me.

Mr. Fraser.—I am one of the public officers of the banking company. On the 19th of April I was at the meeting. I heard Mr. Vincent say that the working classes were not bound by any laws enacted by a parliament in which they were not represented. He told them they were entitled to be armed. These meetings were calculated to endanger the public peace.

Cross-examined.—I have heard him recommend the people to be peaceable. I received no interruption.

Mr. Thomas Griffin Phillpotts.—I am an attorney, residing at Newport. I was in my office on the 19th of April. At about eight o'clock in the evening I heard cheering. I saw a crowd of persons, as many as twenty had sticks. They were walking-sticks, all but one, and that was short. The persons were in number several hundreds. In about half an hour I went to the meeting, and saw all the defendants, except Dickenson. I heard Mr. Vincent speak. He said the working class was an industrious class, and the upper classes were the idle classes, and living upon the industrious. He said a rising of the people was likely soon to happen; that parties were not bound to obey the laws unless they were represented. A great deal was said about the people's charter. Mr. Vincent said a great deal was

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said about the British soldiers, and Mr. Vincent said when the time for resistance arrived, let the cry be, "To your tents, O Israel! and then with one heart, one voice, and one blow, perish the privileged orders. Death to the aristocracy! Up with the people and the government they have established." The meeting was calculated to excite alarm. I was not alarmed. Mr. Townsend interrupted Mr. Vincent, and said they were going to shoot Mr. Vincent, and pointed at the direction from which they were going to fire. No firing occurred. Mr. Edwards was moving about, and said something about his police.

Cross-examined.—I did not hear Mr. Vincent say that if the meetings were illegally put down the time of resistance is come. I had a stick myself. I always carry a good-sized one. I had dined, and had taken three or four glasses of wine. The words, "To your tents, O Israel," is from the First Book of Kings, when the tribes revolted. I have looked at the passage since, as it struck me. Mr. Vincent proposed that they should treat the soldiers kindly.

Re-examined.—He advised that they should treat the soldiers as brothers, and he proposed three cheers for the British soldiers.

Mr. Henry Williams deposed to seeing the defendants at a meeting on the 19th of March, 27th of March, 18th of April, and 25th of April. This witness also said—I heard Mr. Vincent speak at one of the meetings. He said the charter was the only remedy, and they must resort to force if they could not get it in any other way. This was received with cheers. I apprehended danger to life and property.

Cross-examined.—I apprehended danger as early as the first meeting. I attended the meetings for the protection of my property. I was at my own door. I live close to the meetings. I heard Mr. Vincent at every meeting tell the people to keep the peace. I once heard the phrase that their motto ought to be "Peace, law, and order." I have

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heard it urged on the people not to injure persons or property in Newport or elsewhere. I considered it likely that life and property would be in danger if the meeting continued.

Isaiah Waterloo Nicholson Keyes.—I am in the printing office of the Merlin newspaper. I attended the meeting of the 25th of March. I heard Mr. Vincent address the meeting. I made a report for the Merlin. Mr. Dickenson said that if the Chartists were attacked they would be justiffed in treating those who attacked them as they would treat a mad dog; and at the meeting of the 27th of March Mr. Vincent said that every hill and valley should send forth its army in the event of its being called for by the Convention. I believe he asked those who would be prepared to hold up their hands. Mr. Edwards did so, and said, "Here is stuff." Many others held up their hands. I attended a meeting on the 18th of April. Mr. Vincent spoke. He said England was a large farm, the poor labourers on which had been plundered. He said the plunderers should earn their bread as the labourers did, or the Chartists would throw them over the hedge. He said a blow should be struck in England, and twenty-four hours would decide its fate. At the meeting on the following day I heard the expression, used by Mr. Vincent, "To your tents, O Israel, and then with one heart, one voice, and one blow, perish the privileged orders, death to the aristocracy, and up with the people and the government they have formed." On the 25th of April I was at another meeting. Mr. Vincent began by calling the people assembled "the British democracy."

Cross-examined.—I did not consider myself in danger. At one of the meetings some one, on the mayor's name being mentioned, said, "Choke him," and Mr. Vincent said, "Don't do that; I hope to convert them all."

Mr. Johnstone.—I am a commercial traveller. I reside

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at Liverpool. On the 27th of April I called on Mr. Townsend. After business he asked me what I thought of the Chartists in Lancashire. I said I pitied them, as they were the deluded victims of designing knaves, who had no character or property to lose, but who sought to excite the people to rebellion, in the hope that in a general scramble they should get something. I asked if they had many Chartists about Newport. He said they had a great many, and that at a meeting just held they had beaten or frightened the magistrates, and he said he was the treasurer to the body. I said, in a careless way, that if we had been in our former trade we might have turned it to a pecuniary profit. He inquired what it was, and I said we had been in the trade of supplying the African chiefs with muskets, matchets, (a sort of short sword used in cutting sugar cane), cutlasses, and pistols. He asked the prices, and said he could give me an order, and pay cash for them, as he was treasurer of the body. I asked to what extent his order would go, and he replied, two hundred to three hundred muskets, five hundred to six hundred cutlasses, and pistols in proportion; and he added, "You must undertake the delivery at Newport." I then said very seriously, for I spoke jocularly before, that we would not supply arms for such an abominable purpose.

Cross-examined.—I found great excitement at Ponty-pool, and I communicated with one of the magistrates, and I learnt at the iron works that Mr. Vincent, Mr. Edwards, and Mr. Townsend, had been there, and they feared a revolt.

Re-examined.—I heard that commercial men could get neither money nor orders, as the country was in such an excited state that business was at a stand-still. It was then that I communicated what I heard to the magistrates.

William Needham, Esq.—I am a magistrate. I had great difficulty in getting special constables. At several of the iron works the men all refused.

ALDERSON, B.—Did you indict them for refusing?

Witness.—No, my lord.

ALDERSON, B.—You had better do so, if it occurs again.

Mr. Harris.—I heard Mr. Vincent, at one of the meetings, say that the mayor was a nincompoop, and his partner, Mr. Protheroe, no better; and they were the greatest enemies to the working people. The crowd shouted, "They are, they are." Mr. Vincent further said that he should like to see Mr. Protheroe hung up to the lamp-post, and he should like for the people to cut him down, and he would name the place for the interment of his carcase.

Cross-examined.—I am sure that Mr. Vincent did not say, in my hearing, that the mayor and his partner, and such as they were, mistook the Chartists for persons who would hang people to the lamp-post. I am quite sure that he said that he should like to see Mr. Protheroe hung up to the lamp-post. I did not run away in horror. There was a good deal of cheering at the last sentence. I believe this was on the 25th of March.

Edward Karnes.—I reside at Newport. My father and Mr. Townsend talked of the Chartists. The latter said the Chartists were so powerful in Newport that they could pull down the house of any one who opposed them in an hour or half an hour.

At the conclusion of the case for the prosecution, *Roebuck*, for the defendants, asked that a witness, whose name was on the back of the indictment, might be called, that he might cross-examine him.

Talfourd, Serjt.—This is not a case of felony.

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ALDERSON, B.—The calling of a witness whose name is on the back of the indictment, for the other side to cross-examine him, is by no means of course. It is discretionary even in felony, but it is a discretion always exercised, and I think it may well be exercised in misdemeanor.

Talfourd, Serjt.—I shall make no objection.

The witness was called, but did not answer, and it was stated that he was not in Monmouth.

Roebuck, for the defendants.—The first charge against the defendants is a charge of conspiracy for certain purposes contrary to law. Now, without meaning to justify every indiscreet expression used at a public meeting, I do mean to contend, that these meetings were just such as have been seen in the country for the last ten or fifteen years, their object being to obtain what the defendants called "the Charter;" and their mode of arriving at this their object was by obtaining so great a number of signatures to their petition as would entitle it to respect. From whom then did this prosecution come? From the last persons from whom it ought. The present Ministers had taught the people that this was the way in which they were to obtain their ends. There was no large town which had not had its peace invaded by meetings just of this kind. Ministers had taught the people this mode of proceeding on one day, and could not unteach them on the morrow. There is a man on whose breath the very existence of the present ministry depends, who has been guilty of more crime (if crime it was) in carrying on agitation, in procuring what he called justice for Ireland, than anything done by these defendants. And if Mr. O'Connell may one day assemble fifty thousand fighting men, and next day dine with the Lord Lieutenant of Ireland, the august representative of her Majesty, may not the defendants reasonably say, what harm can there be in

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our having a few meetings in the county of Monmouth? The defendants wished for what they called the five points of the Charter, which were, annual Parliaments, the vote by ballot, universal suffrage, no property qualification, and payment to the members. It is said that they wished to bring the Government into contempt. If by the Government was meant the ministry, and the offence was to bring them into contempt, I am the most offending man alive; but that was no crime, for if the ministers met with contempt, they deserved it. But it is then said, the means were unlawful, because the meetings were calculated to alarm. Now, this must be not an alarm such as would frighten any timid person, but it must be under such circumstances as would alarm persons of reasonable courage, and used to the world. If persons had seen the meetings of the last ten years—some for reform, some for emancipation of the blacks, some against the poor laws, would they fear these? Indeed, there was scarcely any subject on which some busy man or other did not get up a meeting, and every one got as large a meeting as he could, and if it was really a large meeting, it was held in the open air; and if very few people came, the originator of the meeting always then said it was a highly respectable meeting which assembled in a very small room. With respect to the story of the pigeons, this was not the invention of the defendant Vincent, but is to be found in the work of a clergyman of the Church of England, whose works are taught in our universities. The evidence given as to the speeches of the defendants consists only of isolated phrases and sentences. It is unjust to take a part of a speech or writing without the rest; and I could take a part of the writings of the learned Serjeant, (Talfourd), and if taken alone, it would form a very democratic speech; but that is an unfair way of putting it. What a jury should look at is the intention of the men, and not mere words, for there are few persons who speak for an hour who do not say something which they wish afterwards

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unsaid. I fear also that there is a good deal of personal feeling in the case. The defendants have been unwise enough to quarrel with the mayor and magistrates, and they having called the mayor and his partner nincompoops, it was considered by the magistrates that they must, to keep up their own dignity, bring forward the prosecution. The phrase, "The Charter we will have," is no worse than the words that I have heard till I am quite tired of hearing them; I mean, "The bill, the whole bill, and nothing but the bill." I know not if any of you have used those words; but if you have, I have no doubt that an indictment might have been preferred just as easily as the present indictment has been preferred against the defendants. The present ministry gave the cry of "Nothing but the bill," and yet they will not allow to the defendants the cry of "Nothing but the Charter." The ministers have got their bill passed, and now they say to others, "We have got our bill, but we will take care you don't get your Charter." It is alleged that the defendants have said that persons ought not to pay taxes imposed by a Parliament in which they were not represented; but taking that to be so, we ought not to forget that at the time of the Reform Bill, Earl Fitzwilliam said he would pay no more taxes imposed by the unreformed Parliament, because it did not represent the nation. In this case there was no going to be drilled, no assemblies with arms, and as to the bad hours, the example was set by our superiors in Parliament, all the legislation being after midnight, and all the speeches before. The poor can only meet at particular times, and in places to which they have access; and, in almost the language of Lord John Russell, I will say that the pent-up feelings of the people evaporating at a public meeting does more good than a host of mayors and magistrates, with their special constables around them, and the yeomanry to boot. The only material evidence is the supposed proposal to hang Mr. Prothero: that was a thing upon which the witness might easily be

mistaken, and probably was so. There is indeed the statement of the witness from Liverpool, (Mr. Johnstone), that he being a person who sold muskets to the negroes, and being an enemy to the Chartists, and out of that business, the defendant, Townsend, intended to buy muskets and cutlasses of him. It is clear that he could not be serious, more especially as the talk about the muskets originated with the Liverpool iron trader, and not with the defendant.

ALDERSON, B.—In summing up—I take it to be the law of the land that any meeting assembled under such circumstances as, according to the opinion of rational and firm men, are likely to produce danger to the tranquillity and peace of the neighbourhood is an unlawful assembly. You will have to say whether, looking at all the circumstances, these defendants attended an unlawful assembly, and for this purpose you will take into your consideration the way in which the meetings were held, the hour of the day at which the parties met, and the language used by the persons assembled and by those who addressed them. Every one has a right to act in such cases as he may judge right, provided it be not injurious to another, but no man or number of men has a right to cause alarm to the body of persons who are called the public. You will consider how far these meetings partook of that character, and whether firm and rational men having their families and property there would have reasonable ground to fear a breach of the peace, for I quite agree with the learned counsel for the defendant, that the alarm must not be merely such as would frighten any foolish or timid person, but must be such as would alarm persons of reasonable firmness and courage. The indictment also contains charges of conspiracy, which is a crime which consists either in a combination and agreement by persons to do some illegal act, or a combination and agreement to effect a legal purpose by illegal means. The purpose which the

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defendants had in view as stated by the prosecutors was to excite disaffection and discontent, but the defendants say that their purpose was by reasonable argument and proper petitions to obtain the five points mentioned by their learned counsel. If that were so, I think it is by no means illegal to petition on those points. The duration of parliaments and the extent of the elective franchise have undergone more than one change by the authority of parliament itself; and with respect to the voting by ballot, persons whose opinions are entitled to the highest respect are found to differ. There can also be no illegality in petitioning that members of Parliament should be paid for their services by their constituents; indeed, they were so paid in ancient times, and they were not required to have a property qualification, till the reign of Queen Anne, and are now not required to have it in order to represent any part of Scotland or the English universities.

If, however, the defendants say that they will effect these changes by physical force, that is an offence against the law of the country. No civilized society can exist if changes are to be effected in the law by physical force. And if eminent persons have done as the learned counsel has stated, and their conduct were to come before us in a court of justice, we should (however painful it would be to be placed in such a situation) act towards them also, exactly as we ought now to act towards the present defendants. With respect to the speeches of the defendants at the meetings, I entirely agree with the observations of their learned counsel that nothing is more unfair than taking a part of a speech without its fair context, and you will therefore take the whole which is proved, and consider whether anything else that was said altered the effect of the passages relied on by the prosecution. You will say, whether you are satisfied that the defendants conspired to excite disaffection; if you are so, you will find the defendants guilty of the conspiracy. You will also say, whether you think

that the nature of the meetings was such as would excite alarm in the minds of rational and constant men; for if so, I am of opinion that they were illegal meetings, and then you ought to find the defendants guilty on the counts for attending unlawful assemblies.

The jury found all the defendants Not guilty of conspiracy, but Guilty of attending unlawful assemblies.

Talfourd, Serjt., *R. V. Richards*, and *Whateley*, for the prosecution.

Roebuck, and *Keating*, for the defendants.

[Attornies—*T. Jones Philips*, and *Roberts*.]

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GLOUCESTER ASSIZES.

(*Civil Side.*)

BEFORE MR. BARON ALDERSON.

DOE *d.* COUNSELL & PARKER *v.* CAPERTON.

A. in the year 1819 agreed to purchase lands of B. for 670*l.*, and paid a deposit of 10*l.* The agreement did not contain any stipulation that A. should be let into possession, but in fact he was so at Michaelmas in the year 1819. A. continued in possession, and neither paid any more of the purchase-money nor any rent or interest, and in 1822 A. cut down timber, and in 5 Geo. 4, levied a fine with proclamations, and mortgaged the property, and after that died, leaving the property, subject to the mortgage, to his daughters :—*Held*, that these facts were no bar to B. in ejectment brought within twenty years after, Michaelmas, 1839, as A. coming in under an intended purchase was in equity the owner of the land, with a liability to pay the purchase-money, and his cutting trees was consistent with his holding in that character, and not adversely to the rights of the vendor, to whom at law he was tenant at will.

The attestation of a deed was in the following form :—"Sealed and delivered by the within-mentioned C. A., in the presence of R. P. C." It was proved by the attesting witness that the signature R. P. C. was of his hand-writing, and that he had no recollection of the transaction, but that he should not have signed the attestation if he had not seen the deed executed :—*Held*, sufficient, and that the fact that the attesting witness was neither an attorney nor an attorney's clerk made no difference.

It is always extremely injudicious to have a will attested by marks, on account of the difficulty of proving their identity. A will was attested by the signature T. B. V. and the marks of C. and M. D. All these were dead; the signature of Mr. V. was proved, and the daughter of C. and M. D. proved that they were both dead, and that when alive they lived near the testator, no other persons of those names living anywhere in that neighbourhood; and this witness also stated that M. D. could not write, and C. D. could write his name only :—*Held*, sufficient.

A witness who resides in Dublin is out of the jurisdiction of the Courts of this country so as to let in proof of his hand-writing, the same as if he were dead.

A court roll stating that a surrender was by power of attorney, would be secondary evidence of the power of attorney if the power of attorney cannot be found after a sufficient search.

The steward of a manor proved that where a surrender was by power of attorney, the practice was to keep the power of attorney with the court rolls. The power in question, which was for a surrender in 1814, could not be found either with the court rolls or any where in the office in which the court rolls had been kept ever since 1814. both by the present steward and his predecessor, who was steward in 1814 :—*Held*, sufficient to let in secondary evidence.

EJECTMENT to recover freehold and copyhold property situate at Upton St. Leonards.

It was opened by *Ludlow*, Serjt., for the plaintiff, that this property had originally belonged to Mr. William Abell, who died, and of whose family Mr. Counsell, one of the lessors of the plaintiff, had bought it in the year 1814. And that in the month of August in the year 1819, Mr. John Abell, the son of Mr. William Abell, being desirous to repurchase it of Mr. Counsell at the same price Mr.

Counsell gave for it, an agreement was made between them for the repurchase, upon which a deposit of 10*l.* was paid, and Mr. John Abell let into possession, and that no more of the purchase money had been paid, neither had any interest or rent, although Mr. John Abell and those who represented him, had been in possession of the property ever since. The intended defence, was that John Abell who was since dead had levied a fine.

On the part of the plaintiff it was proposed to put in deeds of lease and release, dated the 24th and 25th of March, 1814, the release being between Comfort Abell and Anne Abell of the first part, Richard Haviland, a trustee of an attendant term of 1000 years of the second part, George Worrall Counsell of the third part, and Charles Parker, of the fourth part, by which the two Misses Abell conveyed the freehold property to Mr. Counsell in fee. Mr. Haviland assigning the term to Mr. Parker to attend the inheritance.

The attestation of the release was in the following form: "Sealed and delivered by the within-named Comfort Abell, Anne Abell, Richard Haviland, and George Worrall Counsell, in the presence of R. P. Chandler."

To prove the execution of the release Mr. Chandler was called: he stated that the signature R. P. Chandler was of his handwriting, but that he had no recollection of the transaction; but in answer to questions by *Alderson*, B., he said, he should not have signed the attestation if he had not seen the deed executed.

Talfourd, Serjt.—I submit that this is not enough; certain formalities are necessary in the execution of a deed, which the witness cannot depose to, and they might have been omitted from his not knowing that they were necessary. If he had been an attorney, it might be otherwise.

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ALDERSON, B.—In this respect there is no distinction between attornies and other persons. Mr. Baron *Parke* and I conferred on this subject on the last Northern Circuit, and we held, that such proof as the attesting witness has here given was sufficient.

The deeds were put in.

It appeared that William Abell died on the 19th of September, 1812; and it was proposed to put in his will, dated September the 6th, 1812, which was attested by the signature of T. B. Villiers and the marks of Charles and Mary Drinkwater. The death and handwriting of Mr. Villiers were proved; and to prove the deaths of Charles and Mary Drinkwater, their daughter Mary Drinkwater the younger was called. She said, "I am the daughter of Charles and Mary Drinkwater; they are both dead; they lived near Mr. William Abel. My mother could not write, and my father wrote his name only. No other Charles Drinkwater and no other Mary Drinkwater lived anywhere in that neighbourhood."

ALDERSON, B.—I think that this is sufficient evidence of the identity of Charles and Mary Drinkwater. It is always extremely injudicious to have a will attested by marks, on account of the difficulty of proving their identity.

The will was read.

With respect to the copyhold, Mr. Jenkins, the steward of the manor of King's Barton, produced the court-roll of a surrender by John Abell, as the heir of William Abell, to the use of George Worrall Counsell, on Oct. 12, 1815, and the admission of Mr. Counsell of the same date.

Mr. Jenkins said, "The surrender was under a power

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of attorney, which I cannot find. The powers of attorney are usually deposited with the rolls."

ALDERSON, B.—The court-roll stating it to be by power of attorney would be secondary evidence of the power of attorney, if it cannot be found.

Mr. Jenkins.—"Mr. Philpotts, the member of Parliament, was steward of this manor in the year 1814. I succeeded him; and when I did so, I succeeded to the room in which the documents were kept, and they have never been removed."

ALDERSON, B.—As the papers were never shifted, this is in effect a search in Mr. Philpotts's office.

Mr. Jenkins.—I have also searched in the office of Messrs. Whitcombe and Helps, in which Mr. Philpotts was formerly a partner, but could not find the power of attorney there.

ALDERSON, B.—I think that this is quite sufficient to make the surrender admissible.

The surrender was read.

It was proposed to put in the agreement between Mr. Counsell and Mr. John Abell, dated the 14th of August, 1819. This agreement was attested by Mr. Thomas Dance; and it was proved by his brother that Mr. Thomas Dance resided in Dublin, and that he (the witness) had received a Dublin newspaper from him within a week of the time of the trial.

Talfourd, Serjt.—Is that out of the jurisdiction?

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ALDERSON, B.—It is. Our subpœna will not reach a witness in Dublin.

The agreement was read. It was dated the 14th of August, 1819; and by it Mr. Counsell agreed to sell, and Mr. John Abell to buy, the property for 670*l*. The agreement did not contain any stipulation that the vendee should be let into possession; but on the back of it was a receipt for a deposit of 10*l*.

To prove that Mr. John Abell was let into possession, Mr. Hulbert was called. He said, "I occupied the property; John Abell came to me, and asked for possession; he said he had bought it of Mr. Counsell, and paid 10*l*. deposit. I went with him to Mr. Counsell, who told me I might give possession, and I did so; this was nineteen years ago last Michaelmas."

Evidence was given of a demand of possession made on the premises in 1834.

Talfourd, Serjt., for the defendant, opened, that John Abell had dealt with the property as his own, and had, in the year 1824, levied a fine of it, and raised 200*l*. on it by a mortgage; and that John Abell, who died in the year 1827, by his will, dated on the 3rd of July in that year, devised the property (subject to the mortgage) to his daughters, one of whom had married the defendant.

ALDERSON, B.—There is no adverse possession.

Talfourd, Serjt.—The agreement does not contain any permission to enter.

ALDERSON, B.—We must take the facts all together. You are let into possession on the ground of a purchase.

Talfourd, Serjt.—As to the copyhold, I know that the

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fine can have no effect; but as to the freehold, we can shew adverse acts, such as cutting down timber, and the like; and in the year 1822, which was before the fine, Mr. Counsell brought an action for cutting down timber, which was defended.

ALDERSON, B.—You come in under an intended purchase, and I think that all this is not adverse. A purchaser thus in possession is in equity the owner of the land, with a liability to pay the purchase-money; and his cutting down trees is consistent with his holding in that character, and not adversely to the right of the vendor, to whom at law he is tenant at will.

An examined copy of a fine, with proclamations, of Easter Term, 5 Geo. 4, was put in; and evidence was given, that John Abell had cut down timber on the property soon after he was let into possession, and had built a house there, and that Mr. Counsell said he should keep an account of it.

ALDERSON, B., (in summing up).—The only question is, whether there was an adverse possession. These parties make a bargain for a purchase, and Mr. John Abell is let into possession as a purchaser. You will say whether he was in adverse possession or not. If he were not so, you will find for the plaintiff.

Verdict for the plaintiff.

Ludlow, Serjt., *Thomas*, and *Francillon*, for the plaintiff.

Talfourd, Serjt., and *W. J. Alexander*, for the defendant.

[Attornies—*Lovegrove*, and *Howard & Co.*]

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(*Crown Side.*)

BEFORE MR. JUSTICE WILLIAMS.

REGINA *v.* JORDAN and COWMEADOW.

A boy under 14 years of age cannot, by law, be convicted of feloniously carnally knowing and abusing a girl under ten years old, even though it be proved that he has arrived at the full state of puberty.

To constitute penetration on a charge of this offence, the parts of the male must be inserted in those of the female; *but, as matter of law*, it is not essential that the hymen should be ruptured.

A. was charged with feloniously carnally knowing and abusing a girl under ten. B. was charged with being present, aiding and abetting. A.'s counsel called no witnesses. B., who had no counsel, called a witness to prove an alibi for A.:—*Held*, that this evidence was in effect evidence for A., and that in strictness the counsel for the prosecution had a right to reply on the whole case, but that it was summum jus, and ought to be exercised with great forbearance.

THE prisoner John Jordan was indicted for feloniously carnally knowing and abusing Harriett Thomas, an infant under the age of ten years, and the prisoner Ann Cowmeadow was charged with aiding and abetting him in the commission of the felony.

The prosecutrix stated that the offence was committed at a time when she had been sleeping with the two prisoners, but it was doubtful, on the evidence given in support of the prosecution, whether the prisoner Jordan was fourteen years of age or not; but the surgeon stated positively that he had arrived at the full state of puberty. No evidence was given to shew that the hymen of the prosecutrix had been ruptured.

Greaves, for the prisoner Jordan.—It has been held that, in point of law, a boy under fourteen years of age cannot be guilty of the crime of rape as a principal in the first degree, and the same rule of law must, I submit, apply to this offence. It was also laid down in the case of *Rex* v. *Gammon* (*a*), that in order to constitute a sufficient penetration to warrant the conviction of the offender on a charge of rape, it is essential that the hymen should have been ruptured.

For the prisoner Jordan no evidence was adduced.

(*a*) Ante, Vol. 5, p. 321.

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The prisoner Cowmeadow had no counsel, and she called the father of the prisoner Jordan to prove that Jordan had always slept at home, and, consequently, could not have been sleeping with the prosecutrix and the other prisoner, as stated by the prosecutrix (*a*).

W. J. Alexander, for the prosecution, claimed the right to reply upon the whole case, upon the ground that this witness, though called by the prisoner Cowmeadow, was at least equally a witness for Jordan, as the evidence of the witness went in direct terms to prove an alibi for Jordan, and it was only as a consequence that this evidence was available for the prisoner Cowmeadow.

Greaves.—I must object to this being done, no authority or precedent can be cited for such a course. In replying the counsel has only a right to reply as to those prisoners who call witnesses. If Jordan had been tried alone no reply would have been allowed, and it is too much to say that because another prisoner, with whom he happens to be tried, chooses to call witnesses, that therefore the counsel for the prosecution may reply upon the whole case. In the case of *Rex* v. *Cool* and *Burnell*, tried at the Gloucester Spring Assizes, 1839, the prisoner Cool called witnesses to prove an alibi, who also stated that Burnell was at the same place at which they stated Cool to be, and I in my reply was confined to observing on the evidence adduced for Cool, without adverting to the speech of the counsel for Burnell.

WILLIAMS, J.—I think that this evidence in effect is evidence given for Jordan, and that in strictness the counsel for the prosecution has a right to reply on the whole case; but it is summum jus, and ought to be exercised with great forbearance.

(*a*) We believe that *Greaves* had no instructions to set up an alibi, and did not even know that his client's father was in Court.

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W. J. Alexander replied on the whole case, and adverted to the arguments used for the prisoner Jordan as well as to the evidence.

WILLIAMS, J., (in summing up).—Before you can convict the prisoners you must be satisfied that the prisoner Jordan was of the age of fourteen at the time of the alleged offence, for I do not hesitate to say, that I am clearly of opinion that the same rule which applies to rape applies to this offence also, notwithstanding the evidence of the surgeon (*a*). I am also of opinion, as matter of law, that it is not essential that the hymen should be ruptured. In the case of *Rex* v. *Gammon* it was proved, that the hymen was ruptured, and the point was therefore not necessary to the decision of that case. I also think that it is impossible to lay down any express rule as to what constitutes penetration. All I can say is, that the parts of the male must be inserted in those of the female, but I cannot suggest any rule as to the extent (*b*).

Verdict—Not guilty.

W. J. Alexander and *A. M. Skinner*, for the prosecution.

Greaves, for the prisoner Jordan.

[Attornies—*Fryer*, and *Smallridge*.]

(*a*) See the cases of *Rex* v. *Eldershaw*, ante, Vol. 3, p. 396; *Rex* v. *Groombridge*, ante, Vol. 7, p. 582; and *Reg.* v. *Phillips*, ante, Vol. 8; p. 736, and the case of *Reg.* v. *Allen*, ante, p. 31.

(*b*) See the observations of Mr. Justice *Bosanquet*, in the case of *Rex* v. *M'Rue*, ante, Vol. 8, p. 641.

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WESTERN CIRCUIT.

BEFORE MR. JUSTICE COLERIDGE AND MR. JUSTICE ERSKINE.

DEVIZES ASSIZES.

(Crown Side.)

BEFORE MR. JUSTICE COLERIDGE.

REGINA *v.* JAMES SHEPPARD.

HORSESTEALING.—The prisoner was indicted for stealing a mare, the property of William Browne Canning.

A., who intended to sell his mare, sent his servant with her to M. fair, the servant having no authority either to sell the mare or deal with her in any way. The prisoner asked the servant the price, and desired the servant to trot her out, and the prisoner then went to two men, and having talked to them went away. These two men then came up and

It appeared that Mr. Canning, who resided at Ramsbury, being desirous of selling his mare at the Marlborough November fair, on the 23rd of that month, in the year 1837, sent his mare thither by a servant, named Isaac Newbury, but gave no authority to Isaac Newbury to sell the mare, or to deal with her in any way till he had himself arrived there. It further appeared, that at Marlborough, the prisoner asked Isaac Newbury the price of the mare, which Newbury, who had known him before, told him was 25*l.* The prisoner then told him to take her on the hard road and trot her out; and the prisoner went persuaded the servant to exchange the mare for a horse they had, and they would give 24*l.* for the chop. They changed the saddles, and without giving any money rode away with the mare, leaving the servant with a horse of little value. Four days after the prisoner sold the mare at B., stating that he had got her in a chop at M. fair.

Held, that as the servant had the mere charge of the mare, and had no right to deal with the property in her, the prisoner ought to be convicted of stealing her, provided that the jury were satisfied that the prisoner was in league with the two other men, and that they three, by a fraud in which each of them was to take his part, and did take his part, induced the servant to part with the possession of the mare under colour of an exchange, but they intending all the while to steal the mare.

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and talked to a man on horseback, and a man on foot, and then walked away. These two men then went up to Newbury, and the man on foot offered the man on horseback 24*l.* for the horse he was riding, which the latter refused, saying, he would not sell to him at any price; upon which the man on foot stepped aside to Newbury, and said, if he would chop the mare (Mr. Canning's) for the horse the man was riding, he (the man on foot) would give him 24*l.* for the chop, and 5*s.* to put in his own pocket, at the same time taking from his pocket what appeared to be bank-notes. Newbury declined, saying, the mare was not his; but, being persuaded by the man on foot, Newbury accompanied the two men for about half a mile, and then agreed to the exchange of horses on the terms proposed; and as soon as the saddles were changed, the man who had been on horseback rode away; and on Newbury looking round for the man on foot, he perceived that he had gone away while the saddles were changing. The horse left in exchange was worth about 4*l.*

It was also proved, that, on the 27th of November, 1837, the prisoner had sold Mr. Canning's mare to Mr. Mountain, of Bristol, for 14*l.*, stating it to be his own, and that he got it in a chop at Marlborough fair.

Ball, for the prisoner, submitted, that, as the servant of Mr. Canning meant to part with the entire property in the mare, and not with the possession only, it was no larceny; and that the possession and the property passed by the delivery of the mare (*a*).

(*a*) In the case of *Rex* v. *Jackson*, M. C. C. 119, a pawnbroker's servant, *who had a general authority* from his master to act in his business, delivered up a pledge to a pawner on receiving a parcel from the pawner which he supposed to contain valuables which he had just before seen in the pawner's possession. It was held that the receipt of the pledge by the pawner was not larceny, because the servant, who *had a general authority* from his master, parted with the property and not merely with the possession; and in the case of *Rex* v. *Longstreeth*, M. C. C. 137, it was held that the getting of a parcel

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COLERIDGE, J., in summing up.—If the owner of goods gives up the possession of his goods, at the same time intending to part with the entire property in them, it is no larceny, although he may be defrauded in the bargain. Here, however, there was no parting with the property. The servant Newbury had the mere charge of the mare, and had no right to deal with the property in her in any way whatever. If the prisoner was in league with the two other men, and they three, by a fraud, in which each of them was to take his part, and did take his part, induced Newbury to part with the possession of the mare under colour of an exchange, but they intending all the while to steal the mare, the prisoner ought to be found guilty on this indictment (*a*).

Verdict—Guilty.

Stone, for the prosecution.

Ball, for the prisoner.

[Attornies—*Rowland*, and ———.]

from a carrier's servant, by falsely pretending to be the person to whom it is directed, if it be taken animo furandi, is a larceny, for the servant has no authority to part with it but to the right person.

(*a*) It is not essential that each of the principals in a felony should be present at the entire transaction. In the case of *Rex* v. *Dyer & Disting*, 2 E. P. C. 767, it appeared that Dyer was the master of a boat which was to carry barilla from a ship to the shore; Disting, with the privity of Dyer, separated a portion of the barilla which was on board the boat and placed it at another part of the boat, and the two prisoners together carried it ashore, and carried it off:—*Held*, that though for some purposes the larceny was complete by the first separation of the portion from the bulk, yet, as it was one continuing transaction, Dyer was properly convicted as a principal.

In the case of *Rex* v. *Bingley*, R. & R., C. C. 446, which was a case of forgery, it was held that as each of the prisoners acted in completing some part of the forgery, and in pursuance of a common plan, each was a principal in the forgery, and that although one of them was not present when the note was completed by the signature, he was equally guilty with the others.

In the case of *Rex* v. *Kirkwood*, M. C. C. 304, the Judges confirmed the decision in *Rex* v. *Bingley*, and held that if several make distinct parts of a forged instrument, each is a principal, though he does not

CENTRAL CRIMINAL COURT.

BEFORE MR. BARON PARKE AND MR. JUSTICE BOSANQUET.

1839.

Nov. 30*th.*

REGINA *v.* DAVID PIKESLEY.

In a case affecting the life of a party, it is very desirable that a magistrate who took the depositions against a prisoner with his own hand, should be called as a witness before the depositions are read to prove the correctness of what he took down; but it is not absolutely necessary, in point of law, that he should be called, and the depositions may be read on proof of his hand-writing.

Where a magistrate returns with the depositions that a prisoner was sworn and made a statement, the statement cannot be received in evidence against him, although a witness state that he was not in fact sworn.

THE prisoner was indicted for an unnatural offence committed with a boy of eight years of age.

The depositions were proved to have been signed by Mr. Mores, the magistrate, but it appeared, that, not having any clerk, he took them himself. It being necessary to read them in evidence to contradict a witness—

PARKE, B., said that in so serious a case it was very desirable that the magistrate himself should be present to prove the correctness of what he took down, although in point of law it was not absolutely necessary (*a*).

The depositions were read, and from them it also appeared that the magistrate had written down that the prisoner was sworn, and made a statement which he returned as his examination.

A witness said, that in fact the prisoner was not sworn,

know by whom the other parts are executed, and though it is finished by one alone in the absence of the others; and in the case of *Rex* v. *Dade*, Id. 307, it was held that the makers of the paper and plate respectively, for the purpose of forging a note, afterwards filled up by a third person, are principals in the forgery with that person, though each executed his part in the absence of the others, and without knowing by whom the other parts were executed.

(*a*) See the case of *Reg.* v. *Mary Foster*, Vol. 7 of these Reports, p. 148, and the cases there referred to.

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but PARKE, B., in the presence of *Bosanquet*, J., said, that as the magistrate had returned, that the prisoner was sworn, the statement made could not be received in evidence (*a*).

PARKE, B., in his summing up, after stating the law with respect to the necessary proof of the commission of the capital offence, (inter alia), said:—Then will come the question, whether, if he be not guilty of the capital charge, he can be convicted of an assault? Considerable doubt has been entertained whether upon such an indictment a person can be convicted of an assault if the act is done with the consent of the other party. And one, and I believe two cases (*b*) have been reserved for the opinion of the Judges on that point. If he cannot be convicted of an assault, then he may be liable to be indicted in another form, for the attempt to commit the felony. If, therefore, you are not satisfied that the offence was complete, you will find him guilty of assault, and I will reserve the point for the opinion of the Judges.

The jury acquitted the prisoner of the capital offence, and found him guilty of an assault:—

But there being another indictment for the capital offence, committed with another boy of about six years old, upon which he was found guilty, and sentence of death recorded against him, with an intimation, that, in consequence of his youth the punishment might be commuted to transportation for life,—this conviction rendered unnecessary the further consideration of the question as to the conviction of assault on the first indictment.

Clarkson, for the prosecution.

(*a*) See the cases of *Reg.* v. *Walters*, Vol. 7 of these Reports, p. 267; and *Reg.* v. *Wilkinson*, Vol. 8, p. 662.

(*b*) These cases, owing to the time occupied by *Reg.* v. *Frost*, &c., have not as yet, we understand, been considered by the Judges.

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DECEMBER SESSION.

BEFORE MR. JUSTICE PATTESON, AND MR. BARON ROLFE.

REGINA *v.* BOX.

Dec. 19*th.*

Where a person went into a shop for the purpose of purchasing a ruby pin, and after selecting one, which was put into a box, while the young man who was serving him was absent for a minute, took it out of the box and put it into his stock, and afterwards went into the shawl department of the shop to purchase other articles, saying that he would return and pay for both together, but was allowed to go away without inquiry being made as to whether he had paid in the shawl department, and a bill, including the price of the pin, was sent the next day to the house where he was residing:—*Held*, on the trial of the prisoner for stealing the pin, that, under these circumstances, it was for the jury to say whether there was any intention to steal the pin, and whether there was or was not credit given for it, and also that the prosecutors ought to have called the person who served in the shawl department, and that their not doing so was a circumstance which would justify the jury in looking with some suspicion at the case.

THE prisoner was indicted for stealing a ruby pin, the goods of John Howell and others, in their dwelling-house.

From the evidence of a witness named Webster, who was employed in the jewellery department of the prosecutor's house, it appeared that on the 17th of October the prisoner came there with a lady, and asked to look at some diamond pins, and was shewn a tray containing pins, and among them a ruby pin of the value of eleven guineas, which he selected, and it was put into a box for him; that he then selected a signet-ring, and desired that it might be engraved by the following day. After this, wishing to look at some scarfs, he was shewn to the shawl department; but, before he went, he desired the witness to make out the bill for the whole, and he would return to him. He, however, did not return; and the witness went out, and saw him about to get on his horse, and assisted him to mount. At this time the witness had not missed the pin; but the next day he sent to the house of the prisoner's father a bill, which included the price of the pin. The witness stated that Mr. Sedgwick, one of the partners, was in the house at the time he missed the pin, but he did not mention the fact to him.

A witness, named Arrow, stated that he saw the prisoner take the pin out of the box, and place it in his stock; but did not tell Webster that he had seen it. This witness

admitted that he saw the prisoner the next day in Duke Street, Manchester Square, but added that his presence of mind did not lead him to take the prisoner into custody; but when he saw him at the Opera, some days after, he had him apprehended.

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The person who served the prisoner in the shawl department was not called as a witness for the prosecution.

Clarkson, for the prisoner, asked his Lordship if he thought any larceny had been proved?

PATTESON, J.—I think it is a question for the jury.

Clarkson then addressed the jury, and contended that the case was much more like an improvident contract entered into by the young man than a felony. There is no evidence that at the time he so openly took the pin from the box and stuck it in his breast, he intended to steal it, and his going to the shawl department and saying that he would return and give a check, and not doing so, will not alter the case. Webster may have imprudently let the young man take away the pin. As to the witness Arrow's statement, it has every appearance of a credit transaction. The prisoner's conduct also negatives any felonious intent,—he does not run away. Webster's conduct, also, in sending a bill to the house, and not going after the prisoner, and not communicating the fact to Mr. Sedgwick, also tends to shew that there was a contract, and that no felony had been committed.

PATTESON, J., (in summing up).—There is no doubt that the pin was taken by the prisoner, and that it was taken from the dwelling-house of Messrs. Howell & James; but the question is, whether, at the time the prisoner took the ruby pin out of the box, he intended to steal it. It is not because a person pretends to purchase that the taking of

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an article will not be a felony, if it was a pretended purchase. Generally, we find that parties pretend to purchase one thing, and take the opportunity, while attention is diverted from them, to steal another. But this is a very different case. It is a very peculiar one; and I do not recollect having met with a similar case before. I must say I think that this case has not been presented to you by the prosecutors precisely in the way in which it ought. I think that the person who sold the shawls and scarfs should have been produced before you. The prosecutors could have done this, and they ought: and I think, as they have not, you ought to look at this case with more suspicion than you otherwise would. It seems extraordinary that Webster should let the prisoner, after he had said he would come back and pay for the whole, go away without making any inquiry as to whether he had paid for the things purchased in the other part of the premises. It seems to me, I confess, that that requires a great deal of explanation. The parties who are able to give that explanation are the prosecutors; and for what good reason, in the administration of justice, that explanation is kept back, I cannot conceive. The including the pin in the bill sent the next day will not cure the felony committed previously, if the prisoner intended to steal the pin when he took it from the counter. But it is a circumstance for you to take into account, when you are considering whether you can say you are satisfied that no credit was given, and that the prisoner intended to steal the pin. If the prisoner had reason to conclude that Webster had given him credit, then it will not be a felony; though Webster did not, in terms, give him that credit.

Verdict—Not guilty.

Doane, for the prosecution.

Clarkson, for the prisoner.

MONMOUTH SPECIAL COMMISSION, 1839.

BEFORE LORD CHIEF JUSTICE TINDAL, MR. BARON PARKE, AND MR. JUSTICE WILLIAMS.

REGINA *v.* FROST and Eleven Others.

Dec. 11*th.*

THE special commission, which was a commission of Oyer and Terminer as to all treasons, misprisions of treasons, insurrections, &c., in the usual form, was directed to Lord Chief Justice Tindal, Mr. Baron Parke, and Mr. Justice Williams, and the indictment for high treason on which Frost, Zephaniah Williams, and William Jones, were tried, included also the names of nine other persons. The 1st count charged that all the twelve persons included in it traitorously did levy and make war against our Lady the Queen within the realm, and being armed did march in a warlike manner through divers towns, &c., and did with 2,000 and more with offensive weapons beset houses and force persons to march with them, and did seize arms further to arm themselves to destroy the soldiers of the Queen, and to levy war against the Queen within the realm, and thereby subvert the government and alter the laws by force, and did march into the town of Newport and make a warlike attack upon a certain dwelling-house, did fire upon the magistrates, soldiers, and constables there assembled, and did attempt and in a warlike manner to subvert and destroy the constitution and government of this realm as by law established (*a*).

To constitute the treason of levying war against her Majesty within the realm, there must be an insurrection, there must be force accompanying that insurrection, and it must be for an object of a general nature; and if a person act as the leader of an armed body who enter a town, and their object be neither to take the town nor attack the military, but merely to make a demonstration to the magistracy of the strength of their party, either to procure the liberation of certain prisoners convicted of some political offence, or to procure for those prisoners some mitigation of their punishment, this, though an aggravated misdemeanor, is not high treason.

In a case of high treason the prisoner is not bound of necessity to shew what was the object or meaning of the acts done. The offence charged must be made out by those who make the charge.

(*a*) In this count the marching, &c., were not charged as overt acts of treason, but were charged in the same way as the marching was charged in the first count of the indictment in *Brandreth's case*, 32 St. Tr. 758.

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Second count (in a concise form)—That they did traitorously levy and make war against our Lady the Queen within her realm.

Third count—That they traitorously "did compass, imagine, invent, devise, and intend to deprive and depose our said Lady the Queen of and from the style, honour, and kingly name of the imperial crown of this realm." In this count seven overt acts were charged—viz. 1st, that the prisoners arranged plans to subvert the government, and to alter the laws by force; 2nd, that they conspired to take possession by force of the town of Newport, and to cut off all communication between that and other parts of the kingdom by mails, post, or otherwise; 3rd, that they did conspire to fight with the soldiers of the Queen, and attack the magistrates and justices of the peace and levy war against the Queen within the realm, and subvert the government and change the laws by force; 4th, that they did provide arms and ammunition to destroy the soldiers and subjects of the Queen, and to levy war; 5th, that they did with 2,000 and more march armed in a warlike manner along highways, towns, &c., and force persons to march with them and join them, and did seize arms to arm themselves; 6th, that they did with the 2,000 march into the town of Newport, and attack a dwelling-house, and did fire upon the magistrates, soldiers, and constables therein; and 7th, that they did prepare, levy, and make public war against the Queen within the realm.

Fourth count—That the prisoners traitorously "did compass, imagine, invent, devise, and intend to levy war against our said Lady the Queen within the realm, in order by force and constraint to compel her to change her measures and counsels," and in this count were overt acts similar to those in the third count.

The Grand Jury having returned a true bill against John Frost and eleven others for high treason, the twelve prisoners were placed at the bar.

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TINDAL, C. J.—Prisoners, you have been called into Court at this time for the purpose of being informed that the Grand Jury have found a true bill against each of you for high treason. You will have copies of the indictments, and a copy of the panel from which the jury will be taken, delivered to you in due time; the Court wishes to know if you have any counsel or wish to have any one assigned to you as counsel, and whether you have any attornies; but if you are not now prepared to answer, you will only have to express your wish between this time and the time of your trial, which will not take place until the 31st of this month, and it shall be attended to.

Wightman, for the Crown.—My Lords, I am instructed by the Crown to apply to the sheriff to furnish a copy of the panel.

Mr. Owen, (an attorney)—My Lord, I appear for one or two of the prisoners, and I wish to make an application to have the money which was taken from them returned to them. I appear for Zephaniah Williams.

The Court will not order that money taken from a prisoner charged with high treason be restored to him, unless it be made appear to the Court that the money forms no part of the proof against him.

TINDAL, C. J., (addressing Zephaniah Williams).—Do you wish to have this gentleman as your attorney?

Zephaniah Williams.—I do, my Lord. 10*l*. was taken from me.

TINDAL, C. J.—Before we can grant your application, Mr. Owen, we must know if the money forms any part of the proof.

Wightman.—My Lords, on the part of the Crown we have no objection to give up the money.

TINDAL, C. J.—Then let it be so.

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Mr. Owen.—May I presume to ask, my Lords, if we may not apply to have counsel assigned at a future period between this and the trial?

Counsel may be assigned for a prisoner charged with high treason upon an application made to the clerk of the Crown during an adjournment of the Commission between the finding of the indictment and the arraignment, or the prisoner will be allowed, if he wishes it, to delay naming his counsel till he is brought up to be tried.

TINDAL, C. J.—Certainly, upon your making application to Mr. Bellamy, the clerk of the Crown.

Mr. Bellamy.—You can make the application to me yourself, or by your agent in town (*a*.)

Mr. Owen.—I now beg, my Lords, to make application that copies of the depositions may be furnished to the prisoners.

TINDAL, C. J.—The depositions having been returned to the officers of the Court, you may have them on the terms mentioned in the act (*b*.)

Prisoners charged with high treason will be allowed copies of the depositions against them on the terms prescribed by the stat. 6 & 7 Will. 4, c. 114, s. 3.

Mr. Owen.—My Lords, Mr. Geach defends some of the prisoners; may I make application also on his behalf?

TINDAL, C. J.—No, but the prisoners may apply themselves.

The prisoner Charles Waters.—I beg leave, my Lords, to make application for the depositions in my case.

TINDAL, C. J.—Certainly.

A person charged with high treason cannot be allowed by the

Mr. Owen.—I am instructed, my Lords, on the part of Mr. Frost, to make application that I may be, together with Mr. Geach, assigned as his solicitor.

(*a*) See post, p. 134.

(*b*) The stat. 6 & 7 Will. 4, c. 114, s. 3, set forth ante, Vol. 8, p. 32, and see the case of *Ex parte Greenacre*, Ib.

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TINDAL, C. J.—Are you partners?

Mr. Owen.—No, my Lord.

Court before which he is tried to have two attornies unless they be partners.

TINDAL, C. J.—Which gentleman do you wish to have, Mr. Frost?

The prisoner Frost.—I want the two, my Lord.

TINDAL, C. J.—But the act only gives a power to have one attorney. If there was a partnership it might be otherwise, but without that we have no authority to allow two persons to act as attornies for one prisoner; any person you may choose to employ will have free access to you at all reasonable times.

The Court before whom a prisoner is charged with high treason will not order that papers taken from his house should be restored to him, neither will they order that he shall be furnished with copies of them.

The prisoner Frost.—My Lord, a number of papers were taken from my house, which I understand are to be used against me. I therefore apply either for the originals or copies of those papers.

TINDAL, C. J.—We have no authority to grant that.

Some of the prisoners applied to be furnished with copies of the depositions, and their request was acceded to upon their paying for them according to the terms of the stat. 6 & 7 Will. 4, c. 114, s. 3, and they were directed to inform the clerk of the Crown which of the great number of depositions they should require.

TINDAL, C. J.—For the present take back the prisoners to the place from whence they were brought.

Adjourned to the 31st of December.

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Dec. 31st.

On the 31st of December the Court again sat, when the prisoners were all arraigned, and each pleaded not guilty.

Campbell, A.G., asked that the prisoner's counsel might state whether they intended to sever in their challenges.

Sir *F. Pollock*, and *Kelly*, stated that they appeared for John Frost only, and they should challenge separately.

Thomas.—I shall appear for some of the other prisoners, but have to pray that they may not be called on to name counsel till they are brought up for trial.

TINDAL, C. J.—Let it be so.

Each prisoner was separately asked if he wished to have counsel, and each answered, that he wished to postpone naming his counsel till he was brought up for trial.

The only counsel in a case of

Thomas.—I am also assistant counsel for Mr. Frost (*a*).

(*a*) On the trial of the case of *Rex* v. *Horne Tooke* for high treason, tried in 1794, (25 St. Tr. 4), the two counsel assigned by the Court were Mr. Erskine, (afterwards Lord Erskine), and Mr. Gibbs, (afterwards Lord Chief Justice Gibbs); the assistant counsel being Mr. Dampier, (afterwards Mr. Justice Dampier), Mr. Felix Vaughan, and Mr. Gurney, (now Mr. Baron Gurney).

In the case of *Rex* v. *Stone*, for high treason, tried in 1796, (25 St. Tr. 1155), the two counsel assigned were Mr. Serjt. Adair and Mr. Erskine, (afterwards Lord Erskine), the assistant counsel being Mr. Gibbs, (afterwards Lord C. Justice Gibbs), Mr. Adam, (afterwards Lord C. C. Adam), Mr. Holroyd, (afterwards Mr. Justice Holroyd), and Mr. C. F. Ward; and in the case of *Rex* v. *Crossfield*, for high treason, tried in 1796, (26 St. Tr. 8), the two counsel assigned were Mr. Adam, (afterwards Lord C. C. Adam), and Mr. Gurney, (now Mr. Baron Gurney), the assistant counsel being Mr. Moore and Mr. Macintosh, (afterwards Sir J. Macintosh).

We believe that in each of these instances the whole of the defence in Court was conducted by the two counsel who were assigned by the Court, and we believe that the eminent persons who acted as assistant counsel did not in any in-

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TINDAL, C. J.—The Court can take no notice of that.

Campbell, A. G.—I intend to proceed first with the trial of John Frost.

high treason who are recognised by the Court are the two counsel who are assigned by the Court, and the Court will not take notice of any assistant counsel.

The entire jury panel was called over to ascertain which of the persons appeared, and which were exempt, or to be excused.

Mr. Samuel Babington claimed exemption as a town councillor of Monmouth.

The objection was allowed (*a*).

Richard Hillier was called.—The juror summoned stated his name to be *Joseph* Hillier. The name was struck out of the panel, and, the list having been gone through, sixty of the jury were excused, and twenty-two fined.

Mr. Bellamy, the clerk of the Crown, then began to call over the names of the jurors who appeared, in the order in which the names were placed on the panel, which was alphabetical.

In a case of treason where the prisoner's counsel asked that the names of the jurors should be taken from a ballot-box instead of being called over in the order in which they stood in the panel, which was alphabetical, and this proposition was acquiesced in by the Attorney-General, the Court allowed the names of the jurors to be taken from a

Sir *F. Pollock*.—I must object to the calling of the jurors in alphabetical order. I wish to have the names taken by ballot.

Kelly.—If they are taken alphabetically, the sheriff might select persons of particular opinions, and the prisoners' challenges be exhausted in the first few letters.

Campbell, A. G.—I am perfectly ready to acquiesce in the course proposed, if the Court think it right to accede

stance take any part whatever in the public proceedings in Court, either by examining, cross-examining, arguing, or otherwise.

(*a*) Under sect. 122 of the stat. 5 & 6 Will. 4, c. 76, (the Municipal Corporations Act).

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to it. The present course has been uniformly pursued since the reign of King William the Third. I think the alphabetical arrangement is the strongest proof that the names of particular persons are not selected to be placed at the top of the list.

ballot-box; but if the Attorney-General had objected, the Court would not have granted the application.

Sir *F. Pollock*.—I believe there has not been till now an alphabetical arrangement.

PARKE, B.—I believe that the list at the Central Criminal Court is alphabetical (*a*).

Sir *F. Pollock*.—A greater burden is thrown on the earlier letters, which is unfair towards the jurors.

TINDAL, C. J.—If the application had been objected to, I should not have yielded to it. As the Attorney-General does not object, the names may be called from the ballot-box.

The names of the jurors were taken from the ballot-box.

Each juror was sworn on the voire dire, as to his qualification, before he was sworn to try.

Mr. Edward Davies, of Tintern-parva, had been sworn on the voire dire as to his qualification.

The provisions of the stat. 6 Geo. 4, c. 50, s. 29, with respect to challenging of jurors by the Crown, is a mere re-enactment of the common law.

Campbell, A. G., challenged him for the Crown.

Sir *F. Pollock*, and *Kelly*, objected, 1st, that the Crown has no right to challenge peremptorily; and, 2nd, that the juror had taken the book into his hand to be sworn to

(*a*) We believe that the jury panels on the Crown side on the Oxford Circuit are alphabetical, and that they are called over in regular order from the top. On the Nisi Prius side they are taken from a ballot-box.

try; and that, therefore, the challenge came too late. On the first point, they cited the Jury Act, 6 Geo. 4, c. 50, s. 29.

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actment of the law on this subject as it was before the passing of that statute.

The challenge of a juror, either by the Crown or by the prisoner, must be before the oath is commenced. The moment the oath has begun it is too late. The oath is begun by the juror taking the book, having been directed by the officer of the Court to do so; but if the juror takes the book without authority, neither party wishing to challenge is to be prejudiced thereby.

TINDAL, C. J.—We have no doubt as to the first point.

Campbell, A. G.—In Brandreth's case (*a*), it was held that the officer of the Court should be asked whether he had directed the juror to take the book.

TINDAL, C. J., called on Mr. Bellamy (the clerk of the Crown) to state whether he had directed the juror to take the book.

Mr. Bellamy said that he had not.

TINDAL, C. J.—The rule is that challenges must be made as the jurors come to the book, and before they are sworn. The moment the oath is begun it is too late, and the oath is begun by the juror taking the book, having been directed by the officer of the Court to do so. If the juror takes the book without authority, neither party wishing to challenge is to be prejudiced thereby. As to the first point we are called upon to deviate from a practice of long standing. I think it is not a correct inference from the words of the statute that the Crown is deprived of its right to challenges, except for cause assigned. The 29th section of the stat. 6 Geo. 4, c. 50, is a mere re-enactment of the stat. 33 Edw. 1, st. 4.

PARKE, B.—As to the time of making the challenge, I am of opinion that the prisoner or the Crown must challenge before the oath is commenced, and the delivery of the book to the witness is the commencement of the oath. With respect to the other point, the recent statute is a

(*a*) 32 St. Tr. 770. In that case Mr. Justice *Holroyd* says, that the juror must be challenged "before the book is presented to him."

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mere re-enactment of the old law on the subject. The words are remarkable; the challenge is not to be void, but only the inquisition is not to be postponed by reason of it, which seems to sanction the construction which has been put on it.

WILLIAMS, J.—If the facts had been different with respect to the taking of the book, I should have had great difficulty in distinguishing this from Brandreth's case; for I think the taking of the book is as much a commencement of the taking of the oath as if the first two or three words of the oath had been uttered.

The challenge was allowed.

In charging a jury with a prisoner in a case of high treason, it is not necessary to read the whole of the indictment at length to the jury unless the prisoner or his counsel wish it; it is sufficient for the clerk of the Crown to state the substance of it.

A full jury having been sworn, Mr. Bellamy, the clerk of the Crown, proceeded to give the prisoner Frost in charge, and had read the first count of the indictment to them at length.

TINDAL, C. J.—Sir F. Pollock, do you wish the indictment read at length? If you do, it shall be.

Sir *F. Pollock*.—By no means. I think it would be better understood by stating the substance only.

Mr. Bellamy stated the substance of the other three counts to the jury, and concluded the giving of the prisoner in charge in the usual manner.

During a trial for high treason, which was expected to last several days, the Court ordered that the prisoner's attorney should have access to him

Sir *F. Pollock* asked that the prisoner's attorney might see him daily after the Court broke up, and before it sat in the morning.

TINDAL, C. J.—Let the counsel and attorney have access to the prisoner at any reasonable hour.

Kelly.—Perhaps your Lordships will say till 9 or 10 at night.

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The governor of the prison stated that the debtors were locked up at 9.

every day after the rising of the Court till 10 p. m., and before the sitting of the Court from 7 a. m., although it was stated by the governor of the prison that the prison was not open for any other purpose till half-past 7 a. m., and was shut for the night at 9 p. m.

TINDAL, C. J.—I do not think 10 an unreasonable hour. Let them have access till that time.

Kelly.—At what hour in the morning? At 7?

The Governor.—The bell is not rung till half-past 7.

TINDAL, C. J.—At any time after 7.

Talbot opened the indictment.

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January 1st.

Sir *F. Pollock* wished now to object, that no list of witnesses had been delivered to the prisoner in pursuance of the statute, and wished to be heard on this point before the case was opened by the Attorney-General.

TINDAL, C. J.—We cannot interpose without the consent of the Attorney-General.

Campbell, A. G., opened the case for the Crown, and in his opening said:—This indictment against John Frost consists of four counts. There are two for levying war against her Majesty, in her realm; the third is for compassing to depose the Queen from her royal throne; and the fourth is for compassing to levy war against the Queen, with intent to compel her to change her measures. It is probable that your attention may be chiefly directed to the two first counts of the indictment, for levying war against the Queen in her realm. These two counts are framed upon an act of Parliament passed in the 25th Edward the Third,—a statute which, if properly enforced, is

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to be considered a safeguard of the public peace and of the tranquillity of society; it is a statute neither to be strained nor evaded. There had been, in the reign of Edward the Third, complaints that the law of treason was vague and unknown; and, to secure the country from that miserable state, this statute was passed. It is intitled, "A Declaration which offences shall be adjudged Treason;" and it thus begins:—"Item, whereas divers opinions have been before this time, in what case treason shall be said, and in what not. The King, at the request of the Lords and of the Commons, hath made a declaration in the manner as hereinafter followeth; that is to say"—now these things that follow are to be declared treason—"When a man doth compass or imagine the death of our Lord the King," "or if a man do levy war against our Lord the King in his realm, or be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm, and thereof be probably attainted of open deed by the people of their condition." It is therefore hereby declared to be substantive treason to levy war against the King in his realm, and that is to be proved by acts that are done, and it must be proved clearly and satisfactorily. But then, it is not every breach of the public peace, even with an armed force, that makes out the crime of treason; it must be by some public and premeditated plan, and this is guarded by the statute itself, for the statute goes on with an enactment—"And if percase any man of this realm ride armed, covertly or secretly, with men of arms against any other, to slay him, or rob him, or take him, or retain him, till he hath made fine or ransom for to have his deliverance, it is not the mind of the King or his council that in such case it shall be judged treason, but it shall be judged felony or trespass, according to the laws of the land of old time used, and according as the case requireth." Therefore, you have the line drawn by the statute itself, for it is not to be held treason to ride armed to slay a person, or to rob him, or to take him, or retain him till he hath

made fine or ransom to have his deliverance. Whenever there is a private wrong only to be complained of, a private grievance to be redressed, or a private object to be attained, although force may be used, and although this is an offence against the law, it does not amount to the crime of treason; but where you have an armed force setting the law at defiance for a general object, that is an offence comprehended by that act of Parliament. Levying war against the King does not mean merely heading a force by a pretender to the Crown, as in the wars between the houses of York and Lancaster, or in 1745, but it is where there is an armed force seeking to supersede the law and to gain some public object. I will state to you upon this subject the authority of one of the most eminent and most constitutional of judges that ever adorned the English bench—I mean Sir Michael Foster. He has defined the offence that this statute comprehends, and, after pointing out that it is not to apply to private cases, he says (p. 210):—"The case of the Earls of Gloucester and Hereford, and many other cases cited by Hale, some before the Statute of Treasons, and others after it. Those assemblies, though attended many of them with bloodshed, and with the ordinary apparatus of war, were not held to be treasonable assemblies, for they were not in construction of law raised against the King or his royal Majesty, but for purposes of a private personal nature. Upon the same principle, and within the reason and equity of the statute, risings to maintain a private claim of right, or to destroy particular enclosures, or to remove nuisances which affected, or were thought to affect, in point of interest, the parties assembled for those purposes, or to break prisons in order to release particular persons, without any other acts, have not been holden to be a levying of war within the statute; and, upon the same principle, I think, it was very rightly held by five of the judges, that the rising of the weavers about London did not amount to a levying war, though great outrages were committed on that occasion, not only in London, but in the adjacent country;" "for those judges

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considered the whole affair merely as a private quarrel to prevent the use of a particular engine." "Five of the judges were of a different opinion, but the Attorney-General thought proper to proceed for a riot only." These are the instances in which he says the statute does not apply; but every insurrection intended against the person of the King to dethrone him, or to compel him to alter his government, amounts to levying war within the statute, and every conspiracy to levy war with an overt act for these purposes cannot be effected by numbers without manifest danger. Then follows this passage:—"Insurrections, in order to throw down all enclosures, to alter the established law or change religion, or open all prisons, all risings in order to effect these innovations of a public and general concern by an armed force, are high treason within the clause of levying war; for though they are not levelled at the person of the King, they are against his royal Majesty, and have a direct tendency to dissolve all the bonds of society, and destroy all property and government by an armed force; insurrection for redressing national grievances, or for reforming real or imaginary evils of a public nature, and in which the insurgents have no special interest, risings of this kind are, by construction of law, within the clause of levying war, for they are levelled at the King's crown and royal dignity." It will not be said, I hope, that we are resorting to constructive treason; we seek to bring our case within the specific offence defined by the act of Parliament, as that law has always been enforced. If these avowed insurrections were not to be considered as treason, and to be punished with great severity, what safety would there be for society? There are many temptations of revenge, of wrong-headed zeal, which may lead individuals to attempt to bring about a revolution in the government and change the existing state of affairs. Such attempts, if made by one, may be made by many, and the consequence would be a general dissolution of society, confusion, and disorder. There is another passage in Mr. Justice Foster's work, which follows soon after,

in section 10:—"Attacking the King's forces, in opposition to his authority, upon a march, is levying war against the King:" "but if upon a sudden quarrel, from some affront given or taken, the neighbourhood should rise and drive the forces out of their quarters, that would be a great misdemeanor, and if death should ensue it may be felony in the assailants; but it will not be treason, because there was no intention against the King's person or government." You have it here again laid down that attacking the King's forces, in opposition to his authority, is levying war against the King. If it should be upon some sudden provocation, or without premeditation, it would not be a levying of war; but where it is an attack upon the King's troops by premeditation and design, that is a substantive offence within the act of Parliament. By the stat. 36 Geo. 3, c. 7, the law of treason is clearly defined; it is enacted "that if any person or persons whatever shall within the realm, or without, compass, imagine, invent, devise, or intend death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint, of the person of our Sovereign Lord the King, his heirs and successors, or to deprive or depose him or them from the style, honour, or kingly name of the Imperial Crown of this realm, or of any other of his Majesty's dominions or countries, or to levy war against his Majesty, his heirs and successors, within this realm, in order by force or constraint to compel him or them to change his or their measures or counsels, or in order to put any force or constraint upon or to intimidate or overawe both houses or either house of Parliament, or to move or stir any foreigner or stranger with force to invade this realm or any other his Majesty's dominions or countries under the obeisance of his Majesty, his heirs and successors, and such compassings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare, by publishing any printing or writing, or by any overt act or deed, being legally convicted thereof, upon the

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oaths of two lawful and credible witnesses upon trial, or otherwise convicted or attainted by due course of law, then every such person and persons so as aforesaid offending shall be deemed, declared, and adjudged to be a traitor and traitors." The third count of this indictment charges the prisoner at the bar with compassing or imagining to dethrone our Sovereign Lady the Queen, and to depose her from her royal state and kingly dignity; and in order to prove this it will be necessary to shew you that certain overt acts were done, and it will appear that there was an armed insurrection of a public nature raised and made within the realm with the intention of superseding and destroying the authority of the Crown. This, then, if proved by the oaths of two credible witnesses, as I am instructed it will be, and these overt acts being so proved, I will say, under the direction of my Lords who preside here, amount to the crime of high treason. The last count of the indictment charges the prisoners, with others, with endeavouring to compel her Majesty, by force, to change her measures, and this charge also must be proved by overt acts, and if it be so proved there is a clear treason within the meaning of this statute. Before I conclude these few and brief observations upon the law of treason, I will refer you to the latest authority upon the law of treason. The authority of my Lord Tenterden, in the trial of Arthur Thistlewood and others, and from which it will be seen that, from the time of Sir Michael Foster down to the present, Sir M. Foster's views of the law of treason had been universally adopted. In the 33rd volume of the State Trials, p. 684, are these words of the Lord Chief Justice Tenterden:— "Before the passing of the late statute it had been settled by several cases actually adjudged, and by the opinions of the text writers on this branch of the law, that all attempts to depose the King from his royal state and title, to restrain his person, or to levy war against him, and all conspiracies, consultations, and agreements for the accomplishment of these objects, were overt acts of compassing and imagining

the death of the King. By this statute the compassing or intending to commit these acts, that is, to depose his Majesty, to restrain his person, or to levy war against him, for such purposes, is a substantive treason, and thereby the law is rendered more clear and plain, both to those who are bound to obey it and those who are engaged in the administration of it. It may be proper for me to add, that it has been established in the like manner that the pomp and circumstances of military array, such as usually attend regular warfare, are by no means necessary to constitute an actual levying of war within the true meaning of the ancient statute." And this you will particularly observe to be the case, for the learned Judge whom I have been quoting continues:—"Insurrections and risings for the purpose of effecting by force and numbers—however ill-arranged, provided, or organized—any innovation of a public nature, for redress of supposed public grievances, in which the parties had no special or particular interest or concern, have been deemed instances of the actual levying of war, and consequently to compass or imagine such an insurrection, in order, by force and numbers, to compel his Majesty to alter his measures or counsels, will be to compass or imagine the levying of war against his Majesty for that purpose, within the just meaning of the modern statute. Rebellion at its first commencement is rarely found in military discipline or array, although a little success may soon enable its actors to assume them." Thus, then, we find the learned Judge, who presided upon this not very distant occasion, bearing out fully the same view of the law of treason which had been taken by Sir M. Foster; and, therefore, all insurrections of a public nature in which the parties have no special or particular interest or concern, have been deemed treasons and levyings of war, within the meaning of the statute.

At the conclusion of the opening Samuel Simmonds was called as a witness.

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Sir *F. Pollock* objected that the prisoner had not been properly served with a list of witnesses.

It was proved that the copy of the indictment and the list of jurors were served on the 12th of December, 1839, and that on the 17th of December the list of witnesses was served.

Sir *F. Pollock* and *Kelly* submitted that by the stat. 7 Anne, c. 21, and the Jury Act, 6 Geo. 4, c. 50, s. 21, the list of witnesses must be served at the same time as the list of jurors, simul et semel, and that this was the proper time for taking the objection.

Campbell, A. G., argued, first, that the objection was not well founded; and, secondly, that if made at all, it should have been made at the time of arraignment, and was now too late. He was arguing his second point, when,

TINDAL, C. J., said, that the Court would allow the trial to proceed, and take the opinion of her Majesty's Judges on the points, provided that such a proceeding should become necessary (*a*).

January 2nd. At the sitting of the Court,

Sir *F. Pollock* asked whether, in the event of the objection taken by him as to the list of witnesses being decided in favour of the prisoner, the situation of the prisoner would be the same as if this Court had decided in his favour on the objection being taken.

TINDAL, C. J.—If on consideration the Judges think

(*a*) As the case was afterwards so fully argued on these points before the fifteen Judges, we have omitted the arguments at Monmouth on this part of the case.

that the objection ought to prevail, the prisoner will have the advantage of it.

Campbell, A. G.—The situation of things will be precisely the same as in all other cases where the Judges have reserved a point for the consideration of their learned brethren in Westminster-Hall. No special course can be adopted.

PARKE, B.—Certainly not. If the Judges should be of opinion that the objection ought to prevail, and a conviction has taken place, a pardon will be issued as a matter of course by the Secretary of State.

The witness Samuel Simmonds was described in the list as "Samuel Simmonds, of the parish of Saint Woollos, in the borough of Newport, in the county of Monmouth, labourer."

It appeared that Saint Woollos is a large parish, which includes the borough of Newport and a considerable quantity of land besides.

In a case of high treason a witness was described in the list of witnesses as "S. S., of the parish of St. W., in the borough of N., in the county of M., labourer." N. was a place with 6,000 inhabitants, and formed only a part of the parish of St. W., which was a large parish extending beyond the borough of N.:—*Held*, sufficient, and that it was neither a misdescription nor too general.

Sir *F. Pollock* and *Kelly* objected that this was a misdescription: 1st. Because it did not state the witness to be of "that part of the parish of Saint Woollos which is in the borough of Newport:" and 2nd, that the description was too vague, as Newport was a place having 5,000 or 6,000 inhabitants.

PARKE, B.—I think there is a case in which the parish of Lambeth was held to be sufficient.

Kelly.—There was a case in which an attorney described himself to be of "New Inn, London," New Inn being in Westminster, and that was held to be bad (*a*.)

(*a*) The case of *Steer* v. *Smith*, 6 Esp. 138.

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PARKE, B.—That was a mis-description.

TINDAL, C. J.—This objection shapes itself in a double form: first, it is said to be a mis-description; and secondly, that there is a want of certainty. The description given in the list is this:—"Samuel Simmonds, of the parish of St. Woollos, in the borough of Newport, in the county of Monmouth." It appears to me that this is true in every particular. He was a resident of the parish of Saint Woollos,—in the borough of Newport,—in the county of Monmouth. There was no intention to enter into a detail as to how much of the borough of Newport was in the parish of Saint Woollos. The statute says the prisoner shall be furnished with the name, profession, and place of abode of the witness. Then the next question is, whether this is a bad description, on the ground that it is too general. In the first place, it is said that the parish of Saint Woollos is larger than the borough of Newport, but as he is shewn to have resided in that part of the parish of Saint Woollos which is in the borough of Newport, you may reject such part of the parish as is out of the borough. It is observable that the statute which first gave to the prisoner the advantage of having the names of the witnesses, and their profession and place of abode, coupled in the same sentence the names, profession, and place of abode of both witnesses and jurors. Upon looking at the panel of the jury, I find each juror is returned not of any particular street, but only of the town or the parish in which he lives. To decide in favour of the objection, would be to assume not merely that there has been a void description of this witness, but also a void description of almost every juror. The witness and the juror are placed in the same predicament, and I am of opinion that the statute has been complied with.

PARKE, B.—I am of the same opinion. With respect to the mis-description, it is entirely out of the question; the

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description is perfectly accurate; the witness did live in the parish of Saint Woollos, and in the borough of Newport.

WILLIAMS, J.—I think that this is a more favourable description than if the parish had been generally given, because it is in effect that part of the parish which is within the borough of Newport, and, consequently, that limits and confines the inquiry to a smaller space than if the parish was given generally. With regard to the other point, if it had appeared that the house in which the witness lived had been known by any particular name, there might have been a ground for contending that it was too general a description; but nothing of this sort appears here. It seems to me that the description is such as is constantly given, and that it is a sufficient description.

The witness was examined.

Matthew Williams was called to prove that he was with a party at a Chartists' lodge at Argoed on the 2nd of November, when a person named Reed gave them directions to go to Newport on the following night. The witness did not see the prisoner till he was on his march to Newport on the 4th.

In a case of high treason or conspiracy the prosecutor may either prove the conspiracy which renders the acts of the co-conspirators admissible in evidence, or he may prove the acts of the different persons, and thus prove the conspiracy; therefore in a case of high treason, where it appeared that a party met, which was joined by the prisoner on the next day, the counsel for the prosecution was allowed to ask what directions one of the party gave on the day of their meeting

Ludlow, Serjt., for the Crown, proposed to ask the witness, what Reed said as to the purpose for which they were to go to Newport.

Sir *F. Pollock*.—I submit that directions given in the absence of the prisoner cannot be evidence against him.

Kelly.—We do not object to evidence of the acts of Frost after their meeting; the object here is to shew an intent in Frost by things done in his absence, and anterior to his meeting these parties. As Reed is not indicted, he is not even a co-conspirator.

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as to where they were to go, and for what purpose.

TINDAL, C. J.—I think that this evidence is admissible; the effect of it may be quite another thing. A conspiracy may be shewn by antecedent acts; but that is not the only mode. It may also be shewn by acts done afterwards what the common design was.

PARKE, B.—On indictments for treason and conspiracy, there are two modes in which evidence is rendered admissible. The one is, first to prove a conspiracy, then the acts of the other conspirators are admissible; the other is, to prove the acts of the parties, and thus prove the conspiracy, and that the party charged adopted those acts. This evidence comes under the second class.

WILLIAMS, J.—I am of the same opinion. The matter is not without difficulty; but, according to the cases, it is impossible to exclude the evidence. This case comes within the case of *Rex* v. *Hunt* (*a*), which came before the Court of Queen's Bench, on the question, how far Mr. Hunt could be affected by the conduct of other parties two days before the meeting at Manchester? Mr. Hunt first made his appearance at the meeting. But it was held, that evidence of drilling at a different place two days before, and hissing an obnoxious person, was receivable.

The evidence was received.

January 4th.

On a trial for high treason a witness was described in the list of witnesses as "of Cross-y-Cylog, in the parish of L." The witness stated that he lived near Cross-y-Cylog,

John Phillips was called: he was described in the list of witnesses as "of Cross-y-Cylog, in the parish of Llanvrechva."

The witness said that he lived near Cross-y-Cylog; that there were two public-houses, each called Cross-y-Cylog (which means Cross of the Cock); that he did not live at either of the public-houses, but lived at a house between both, and about sixty yards from each.

(*a*) 3 B. & A. 566.

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It was proved by Mr. Brough, that there was a cluster of houses at the place, and that he had sent invoices to one of them, (neither of the public-houses), and directed them "Cross-y-Cylog," and that letters would be so directed.

TINDAL, C. J.—We think that the description is so doubtful, that the witness ought not to be examined.

The witness was not examined.

Morgan James was called. In the list of witnesses, he was described, "of Pillgwenlly, in the parish of Saint Woollos, in the county of Monmouth, collier, sometimes abiding at the house of his son, John James, in the parish of Bedwelty, in the said county, collier."

It appeared that the house of the witness's son was in the parish of Monythusloyne, and not in the parish of Bedwelty; and that the witness had for eleven years occupied a house at Pillgwenlly, at which his wife resided; but he himself used to work with his son, returning to his house about three days in every two months.

Sir *F. Pollock* objected, that this was a mis-description.

Wilde, S. G.—The first part of the description is correct, and is quite sufficient.

Campbell, A. G.—It would in future be most unfortunate for prisoners, if it should be held that any addition to a correct description, the object of which is to furnish the prisoner with all the information that can be given of the witnesses, should, through some verbal inaccuracy, vitiate what is admitted, per se, to be a good description.

TINDAL, C. J.—Perhaps, giving either of two residences

(which means Cross-of-the Cock), and that there were two public-houses, each so called, and that his house was between them and sixty yards from each. It was also proved that there was a cluster of houses at this place, and that a witness had directed invoices to one of them as Cross-y-Cylog:—*Held*, that the witness was not properly described.

In a case of high treason a witness was described in the list of witnesses as "M. J., of P., in the parish of St. W., in the county of M., sometimes abiding at the house of his son J. J., in the parish of B., in the said county." The witness occupied a house at P., in the parish of St. W., in which his wife resided, he going to work with his son and returning to his house at P. about three days in every two months. The son's house was

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in the parish of M. and not in the parish of B.: —*Held*, that if the witness had been described as of P., in the parish of St. W., that would have been sufficient, but that, as the latter part of the description was incorrect, it vitiated the whole.

might be sufficient; but if you give both, and one of them be faulty, does not that vitiate the whole?

Campbell, A. G.—I assume that the first part of the description is correct, and was alone a sufficient compliance with the statute. The addition arose from an anxiety to give the prisoner the benefit of further information. The place of abode of the witness was correctly given in the first instance; but he also resided with his son, whose place of abode happened to be not in the parish described, but in an adjoining parish: I submit, that the description is sufficient.

TINDAL, C. J.—If the case had rested upon the first part of the description alone, I should have considered it a sufficient description within the meaning of the act; otherwise parties would be put to endless difficulty when persons possess more than one residence, or reside during any period of the year at another place, or at a distance from what is considered their regular abode. This would often occur,—in the case, for instance, of a fisherman, a commercial traveller, or a merchant who goes abroad perhaps every year. If you wanted to describe such a one by his place of abode, that place where he had his house and family must be considered a proper and sufficient description. It appears, however, that more was intended; it seems to have been doubted whether, with propriety, the description could be limited to Pillgwenlly, and it was thought better to describe him as sometimes residing with his son in another place. The whole must be taken together. If all be true, well; but it is true only in the first part; and, although he resided with his son, the parish where his son resided is incorrectly given; and, although the addition of his occasional residence with his son must have arisen from an anxiety to afford every information, my opinion, looking to the act of Parliament, is, that the

description as a whole is inaccurate, and the witness cannot be examined.

PARKE, B.—If a witness has two domiciles, both need not be named. All that the act of Parliament requires is, that the place of abode should be given. The first part alone would have been sufficient, but the latter part is inaccurate, and apt to mislead. It might subject the prisoner to hardship in spending time and making inquiries about the witness in a place where, it is admitted, he could not be found.

WILLIAMS, J.—The question really is, whether the whole is to be considered as the description of the abode. There has been an endeavour to give a more complete description of the place of abode, and the latter part is included in the description. The latter part is not correct,—it gives a wrong parish; the whole description is, therefore, vitiated.

The witness was not examined.

On the part of the Crown, a great number of witnesses were called; and, from their evidence, it appeared that the prisoner John Frost had been for many years a linen-draper, and was also for a short time one of the magistrates of the borough of Newport; and it further appeared, that, in the week previous to the rising which took place, there was a general plan of insurrection, and that consultations and meetings took place, at which it was suggested that the plans were discussed. There was one of these meetings held at Blackwood, upon the Friday preceding the day of the insurrection; at which meeting the prisoner and various deputies attended; and it was sought to be inferred that there the plan was laid for the scheme which was afterwards carried into effect: it being suggested that it was there arranged that the different parties

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of the insurgents should all assemble on the night of Sunday, the 3rd of November, in three principal divisions. The first division, under the command of the prisoner John Frost himself, to assemble at Blackwood; another division, to be under the command of Zephaniah Williams, who kept a beer-shop at a place called Coalbrook Vale, and who was to lead the men from Nant-y-Glo, and that neighbourhood; while the third division was to be placed under the control of a person named William Jones, a watchmaker, residing at Pontypool, and who was to collect all the men from the neighbourhood of Pontypool, and from the north and the west; and they were to meet the others at Risca, or the Cefn, about midnight on the Sunday, and, having there all assembled together, they were to march upon the town of Newport, at which town it was intended they should arrive at about 2 o'clock on the morning of Monday, the 4th. Upon arriving there, they were first to attack the troops, and then break down the bridge which crosses the river Usk, and, thus stopping her Majesty's mail, signal rockets were to be thrown up upon the hills, and the stopping of the mail was to be a signal (by its non-arrival for an hour and a half after its usual time) at Birmingham, to those who were said to be there connected with these designs, for a rising at Birmingham, and a general rising throughout the north of England. It further appeared, that, in pursuance of these intentions, the division under the command of Mr. Frost did assemble much earlier than the other divisions; and, being so assembled, the prisoner gave them the word of command, and he marched with them down by the way of Risca to the Welch Oak, where the junction was to take place; but, from the difficulties which the weather threw in the way of the march of the men from the upper districts, they did not arrive for a very long time after the hour at which it was arranged that they should be there. Zephaniah Williams did not arrive with his men from Nant-y-Glo until daylight, and William

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Jones, of Pontypool, with his men, did not arrive there; but a party, which he sent forward under the command of a man named Britton, did arrive; the main body of the men from the Pontypool district, under Jones, arriving after the attack. Frost remained with the body under his command until daylight, waiting the arrival of the other bodies. As, however, they had not then arrived, he mustered the forces which he then had there under his command, and marched on with them upon Newport. There were then with him, according to the best calculations which could be made, at least 5,000 men, the most of whom were armed, some with guns, others with swords, a large number with pikes, and some with mandrils, an instrument with which they cut coal (a kind of pick-axe); and others were armed with scythes fixed on sticks, and those who could not get arms of this kind were armed with sticks and bludgeons of various kinds. The prisoner Frost took the command, gave the order to march, and they did so; they marched in a sort of military array; and they proceeded through Tredegar Park, the seat of Sir Charles Morgan, where they halted for a time. They then marched on till they came to within about half a mile from Newport. It further appeared, that on the Sunday intelligence was brought to Newport of these movements in the hill country. Mr. Phillips, the then Mayor of Newport, caused the special constables, who had been sworn in, to be stationed at the most important points. These were the three principal inns at Newport, the Westgate Inn, the King's Head, and the Parrot; and the Mayor went to the Westgate Inn, with other magistrates, and sat up during the whole night in that inn, sending out scouts for information, and making the best preparation they could to preserve peace and defend the town. When day had dawned, intelligence was brought that the insurgents were advancing, and in the neighbourhood of Newport. A person of the name of Walker was sent out to gain

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information. That person was shot at, and returned dangerously wounded. The mayor then sent for military assistance. There was in Newport only one company of the 45th Regiment, under the command of Capt. Stack. They were stationed in the workhouse, which had been converted into a temporary barrrack. Captain Stack sent thirty men to the assistance of the mayor, under the command of Lieutenant Gray and two sergeants. Lieutenant Gray brought his men to the Westgate Inn, and they were stationed in a room in that inn; that inn being in the Westgate Street, fronting the north—there being on the east side a room with a bay window, looking towards the street, in which the military were stationed, and a corresponding room on the western side of the Westgate Inn, where the magistrates had been assembled. Between these two rooms there was a corridor, or passage. The special constables remained before the door of the inn, where they had been placed. The military had not loaded, and they did not load their arms until they had been fired upon. This was the state of things in Newport as the insurgents were approaching. Frost was at the head of that body, and giving the word of command, when they reached the weighing-machine of Court-y-bella, where he inquired respecting the military. He was told by two boys, whom he met, that a nnmber of the military had been sent towards the Westgate Inn. Upon hearing that, the insurgents divided; part of them turned to the left, and went up a hill to St. Woollos' church; part kept on to the right, and went down to the town of Newport, through Commercial Street. This last division afterwards came up and joined the others; those who had gone up to St. Woollos' church proceeded down Stowe Hill, which leads to the Westgate Inn, where Frost had been told the military were. He still walked at their head. He passed the Catholic Chapel, close at the back of the Westgate Inn; and the insurgents then tried to gain admission into the

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Westgate Inn by a carriage entrance which leads into the court-yard behind the premises. They failed in effecting their object. They then wheeled round in front of the Westgate Inn, Mr. Frost being still with them. The constables were before the door. The insurgents asked them to surrender; some one said, "No, never;" upon which the word of command, "Fire!" was given; and the insurgents did fire upon the bay window of the room in which the military were stationed; and then attempted to break in at the front door, through the porch into the interior of the house. They made use of their pikes for the purpose of forcing the door. They succeeded, and got into the hall, and thence into the passage leading from the magistrates' room to that where the military were stationed. The window-shutters were closed. The glass had been broken by the shots which had been discharged, but while the window-shutters were closed, the soldiers could not make use of their guns and fire upon the insurgents. Lieut. Gray went to open the shutters of one part of the window, the mayor of another, and Sergeant Daly of another; and, as the mayor was opening the shutters, he received two wounds,—one about the shoulder, and another in the hip. Sergeant Daly was severely wounded in the head by slugs that were fired from without, and a gun he held in his hand had the lock knocked off by a ball from the insurgents. The soldiers were then ordered to fire. At this time the insurgents had gained admission into the house; they were in the passage leading to the room in which the military were assembled; and it was alleged that if the order to fire had not then been given, there was every reason to believe that the military must all have been killed. The insurgents in the passage were first fired upon by the soldiers, and several fell and were killed. The shutters being removed, the soldiers then directed their fire from the window, and thus they had a complete command of the space in which the insurgents had been drawn up.

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They fired into the street, and several were there wounded, and fell. There was a speedy dispersion; the insurgents all fled in every direction. Frost was not seen after the time when the firing first begun. Zephaniah Williams was about ten minutes too late. He, however, did arrive with his men from Nantiglo; a party nearly as numerous as that led on by Frost himself. William Jones, from Pontypool, did not get nearer than the neighbourhood of Malpas, when he heard of what had happened at Newport. He was proceeding down a lane to meet the other party, when he heard of the defeat that had taken place of his associates at Newport, and he likewise fled, and his men dispersed. It was proved, that all these three parties, as they came down, pressed into their service various persons who were unwilling to attend them, but were compelled by them to march, and also seized all the arms they could find, and broke into several houses for these purposes. Frost himself was seen retreating in Commercial Street, and on the road leading towards Tredegar Park, after the firing was over. He was seen soon after in Tredegar Park, about two miles from Newport, making his escape into a wood; and he was apprehended in the town of Newport on the Monday evening, at the house of a person named Partridge, with pistols and powder upon him.

Sir *F. Pollock* addressed the jury for the prisoner, and submitted, that the object of the insurgents was to procure the liberation of certain prisoners who were in custody at the Westgate Inn, and to obtain better treatment for a person named Vincent, who was imprisoned at Monmouth (*a*), and that the designs of the parties were not of a treasonable nature. He also commented on the fact of the prisoner being a person of good character, whose family was in the town of Newport at the time in question.

(*a*) See the case of *Reg.* v. *Vincent*, ante, p. 91.

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In a case of high treason evidence had been given for the prosecution that an armed party attacked the W. hotel, in which the magistrates and troops were stationed. To shew that the intention of the party was not treasonable, but was merely to procure the release of certain prisoners, a witness was called to prove that on the party arriving at the hotel gate, they were asked by a special constable what they wanted, when one of them answered, "Surrender up your prisoners." It was proposed to call evidence in reply to shew that that was not said at the hotel gate:—*Held*, that this was properly evidence in reply.

On the part of the prisoner, it was stated by Mr. Henry Williams, that when the insurgents came to the Westgate Hotel, the first man who came up said to the witness and others, who were there as special constables, "Surrender up your prisoners."

Before *Kelly*, for the prisoners, addressed the jury, *Wilde*, S. G., proposed to call Edward Hopkins as a witness in reply, to contradict the last witness. He proposed to ask him, whether, when the insurgents came to the inn door, a special constable asked of them what they wanted, and whether or not one of them replied, "Surrender up your prisoners?"

Sir *F. Pollock* and *Kelly* objected, that Edward Hopkins had been already called and examined as a witness, and that this was, in reality, (if it occurred at all), a part of the transaction.

Campbell, A. G.—There is no doubt that I cannot examine him, except as to some matter which is evidence in reply.

TINDAL, C. J.—There can be no doubt about the general rule, that where the Crown begins a case, (as it is with an ordinary plaintiff), they bring forward their evidence, and cannot afterwards support their case by calling fresh witnesses, because there may be evidence in the defence to contradict it. But if any matter arises ex improviso, which the Crown could not foresee, supposing it to be entirely new matter, which they may be able to answer only by contradictory evidence, they may give evidence in reply. In this instance, there appears to me to be a necessity for asking this question, and, therefore, that it is reasonable for the Crown to call this witness back.

PARKE, B.—If the Crown could have foreseen the ne-

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cessity of giving this evidence, it ought to have been given in chief; but as it appears to have arisen entirely ex improviso, and as the fact is entirely new, the Crown has a right to call this witness back.

WILLIAMS, J.—I am of the same opinion; but, of course, the examination is to be confined to this matter only.

The evidence was received (*a*).

In a case of high treason where the Crown gave evidence in reply, the witness in reply was called before the second counsel for the prisoner addressed the jury, and the leading counsel for the prisoner commented on the evidence in reply also before the second counsel for the prisoner addressed the jury.

Sir *F. Pollock*.—In common cases, both criminal and civil, I should have a right to comment on this evidence; but I shall not do so in this instance, as my learned friend has to sum up the whole case for the defence. I mention this because I am not aware of any case of the kind that has occurred before.

TINDAL, C. J.—It is rather a question of convenience than anything else, that the learned counsel in summing up should take this as part of the case.

Sir *F. Pollock*.—Though I do not mean to use my privilege, yet I am anxious that no right to which the prisoner is entitled, or which is by law enjoined, should be surrendered. I have but a few words to say, and those are for the sole purpose of proving the right of every prisoner in respect of evidence called in reply. My learned friend will, I am sure, do justice to all parts of the case, and I shall, therefore, thank you for the attention with which you heard me yesterday, and only ask you to consider well the value of the evidence which has been given before you.

Kelly addressed the Jury for the prisoner, and argued

(*a*) See the cases of *Rex* v. *Stimpson*, ante, Vol. 2, p. 415, *Rex* v. *Hilditch*, ante, Vol. 5, p. 299, and *Rex* v. *Findon*, ante, Vol. 6, p. 132.

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that the question, as far as the prisoner was concerned, was one of intention, and that although they might be of opinion that the acts of outrage had been clearly proved, and that the prisoner had participated in them, yet they could not find him guilty of high treason unless they were satisfied that he had the intentions and designs attributed to him in the indictment; as, without that, the offence would be no more than an aggravated misdemeanor. He referred, in the course of his address, to Hale's Pleas of the Crown (*a*); Rot. Parl. 5 Hen. 4, 12; and *Lord George Gordon's case* (*b*).

At the conclusion of *Kelly's* address to the jury, the prisoner was asked by the Court whether he wished to say anything in addition to what had been urged by his counsel, and he replied that he did not.

Wilde, S. G., in reply, contended, that the intention of the prisoner was to take possession of the town of Newport by surprise, by terror, or by force, and to use that possession as a mode of raising a rebellion; and that whether or not he incidentally intended to procure the release of Vincent, would not make any difference. He referred to *Brandreth's case*, and Lord Tenterden's charge to the Grand Jury in the case of Thistlewood.

TINDAL, C. J., in summing up, (after citing the stat. 25 Edw. 3, st. 5, 36 Geo. 3, c. 7, and the works of Mr. Justice Foster and Sir M. Hale), told the jury that it was essential to the making out of the charge against the prisoner that there must be an insurrection, that there must be force accompanying such insurrection, and the object of it must be of a general nature; and his Lordship also laid down that it was not incumbent on the prisoner to shew what was the object and meaning of the acts done,

(*a*) Pages, 130, 135, 136. (*b*) 21 St. Tr. 485.

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but that it was the duty of the prosecutors to make out their case against the prisoner.

Verdict—Guilty (*a*).

Counsel for the Crown—*Campbell*, A. G., *Wilde*, S. G., *Ludlow* and *Talfourd*, Serjts., *Wightman* and *Talbot*.

Counsel for the Prisoner—Sir *F. Pollock* and *Kelly*.

Assistant Counsel—*Thomas*.

[Attornies—*Maule* and *Geach*.]

(*a*) For the report of the points decided in this case we are indebted to the kindness of one of the learned counsel engaged in it.

On a trial for high treason it was objected, after the jury had been charged with the prisoner, but before the first witness was examined, that the prisoner had had no list of witnesses delivered to him under the stat. 7 Anne, c. 21. It appeared that the indictment was found on the 11th of December, and that on the 12th of December a copy of it and of the panel of the jurors intended to be returned by the sheriff, were delivered to the prisoner, and that on the 17th of December the list of witnesses was delivered to him. The prisoner was arraigned on the 31st of

THE CASE stated for the opinion of the fifteen Judges was as follows:—

The Queen v. *John Frost, and eleven Others.*

The prisoners were indicted for high treason, the indictment containing two counts upon the statute 25 Edw. 3, for levying war against the Queen in her realm.

The several prisoners were arraigned on this indictment upon Tuesday, 31st of December, 1839, and pleaded thereto not guilty; and, having declared their intention of severing in their challenges, the Attorney-General, on the part of the Crown, applied to the Court, that John Frost might be first put upon his trial, which application was granted.

The jury were thereupon called, and, after challenges made on the part of the prisoner and the Crown, a jury was sworn, and charged with the prisoner upon the said indictment.

Upon the first witness being called, and before he was sworn, the prisoner's counsel objected, that neither that witness nor any other could be examined, as the list of the witnesses had not been delivered according to the statute 7 Anne, c. 21, s. 11.

By that section it is enacted, that, after the period of

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time therein mentioned, (which has long expired), " when any person is indicted for high treason, or misprision of treason, a list of the witnesses that shall be produced on the trial for proving the said indictment, and of the jury, mentioning the names, profession, and place of abode of the said witnesses and jurors, be also *given at the same time that the copy of the indictment is delivered to the party indicted,* and that copies of all indictments for the offences aforesaid, *with such lists,* shall be delivered to the party indicted ten days before the trial, and in presence of two or more credible witnesses, any law or statute to the contrary notwithstanding."

December. The objection to the delivery of the list of witnesses was, that the copy of the indictment and the lists of jurors and witnesses should have been all delivered *at the same time simul et semel*:— *Held*, by a majority of the Judges, that the delivery of the list of witnesses was not a good delivery in point of law, but that the objection to the delivery of the list of witnesses was not made in due time, and the Judges agreed that if the objection had been made in due time, the effect of it would have been a postponement of the trial in order to give time for a proper delivery of the list.

At the time of passing the statute above referred to, the law which required the delivery of a copy of the indictment and of the panel of the jurors returned for their trial, stood upon the statute 7 Will. 3, c. 3, by the first section whereof, it was enacted, " that from and after the 25th of March, 1696, all and every person and persons whatsoever that shall be accused and indicted for high treason, whereby any corruption of blood may or shall be made to any such offender or offenders, or to any the heir or heirs of any such offender or offenders, or for misprision of such treason, shall have a true copy of the whole indictment, but not the names of the witnesses, delivered unto them or any of them five days, at the least, before he or they shall be tried for the same, whereby to enable them and any of them respectively to advise with counsel thereupon to plead and make their defence, his or their attorney or attornies, agent or agents, or any of them requiring the same, and paying" as therein mentioned. And by section 7, the same persons indicted " shall have copies of the panel of the jurors, who are to try them, duly returned by the sheriff, and delivered unto them and every of them so accused and indicted respectively, two days, at the least, before he or they shall be tried for the same."

The only legislative provision which has taken place since the statute of 7 Anne, as to the delivery of the

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jury panel, is the 6 Geo. 4, c. 50, s. 21, by which it is enacted, "that when any person is indicted for high treason or misprision of treason in any Court other than the Court of King's Bench, a list of the petty jury, mentioning the names, profession, and place of abode of the jurors, shall be given *at the same time* that the copy of the indictment is delivered to the party indicted, which shall be ten days before the arraignment, and in the presence of two or more credible witnesses; and when any person is indicted for high treason or misprision of treason in the Court of King's Bench, a copy of the indictment shall be delivered within the time and in the manner aforesaid, but the list of the petty jury, made out as aforesaid, may be delivered to the party indicted *at any time* after the arraignment, *so as the same be delivered ten days before the day of trial*; Provided always, that nothing herein contained shall anyways extend to any indictment for high treason in compassing and imagining the death of the King, or for misprision of such treason where the overt act or overt acts of such treason alleged in the indictment shall be assassination or killing of the King, or any direct attempt against his life, or any direct attempt against his person, whereby his life may be endangered, or his person may suffer bodily harm, or to any indictment of high treason for counterfeiting his Majesty's coin, the great or privy seal, his sign manual, or privy signet, or to any indictment of high treason, or to any proceedings thereupon against any offender or offenders who by any act or acts now in force is and are to be indicted, arraigned, tried, and convicted by such like evidence, and in such manner as is used and allowed against offenders for counterfeiting his Majesty's coin." And amongst the statutes and parts of statutes repealed by the 62nd sect. of the said last-mentioned act, is "so much" of the 7 Anne, c. 21, s. 11, "as relates to giving a list of the jury to the party indicted of high treason or misprision of treason."

The bill of indictment was found by the Grand Jury on

the 11th of December, 1839. On the 12th, a copy of the indictment and of the panel of the jury intended to be returned by the sheriff was served on each of the prisoners personally, in the presence of two witnesses.

And on the 17th of December, a list of the witnesses intended to be produced on the trial, mentioning their names, professions, and places of abode, was served in the same manner on each of the prisoners.

Upon these facts it was contended on the part of the Crown—first, that the service of the list of witnesses was a good service under the statute of 7 Anne, c. 21. And secondly, that at all events the application came too late.

This point is reserved for the consideration of her Majesty's Judges.

(Signed) N. C. TINDAL.

BEFORE LORD DENMAN, C. J.; TINDAL, C. J.; LORD ABINGER, C. B.; LITTLEDALE, J.; PARKE, B.; BOSANQUET, J.; ALDERSON, B.; PATTESON, J.; GURNEY, B.; WILLIAMS, J.; COLERIDGE, J.; COLTMAN, J.; ERSKINE, J.; MAULE, J.; AND ROLFE, B.

January 25th.

If, in a case of high treason; a point be reserved for the opinion of the fifteen Judges, their Lordships, if the point be argued, will only hear one counsel on each side; and as the counsel are in the nature of amici curiæ, their Lordships will hear counsel who were not assigned at the trial.

If cases be reserved for two different prisoners on the same point, and both are argued,

CAMPBELL, A. G., (with whom were *Wilde*, S. G., *Ludlow* and *Talfourd*, Serjts. *Starkie*, *Wightman* and *Talbot*) suggested that some arrangement should be made as to what counsel should address the Court and in what order, and whether one counsel for each prisoner or two counsel for each (as it was a case of treason) should be heard.

Sir *F. Pollock* stated that he was counsel for Frost, Mr. *Kelly* for Zephaniah Williams, and Sir *W. Follett* for Jones.

Lord DENMAN, C. J.—Sir *F. Pollock* called on me, and I then thought that we were not bound to hear more than one counsel on a side in each case, but that we must hear one counsel in each case, unless some other arrangement was made by consent.

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GURNEY, B.—The counsel here are in the nature of amici curiæ.

the Judges will hear each case quite separately unless the counsel consent to some other arrangement.

TINDAL, C. J.—If that were not so, we could not hear Sir *W. Follett*, as he was not assigned as counsel for Jones, nor could we hear Mr. *Kelly* in the case of Zephaniah Williams, for the same reason.

Kelly.—I submit that Williams and Jones are each entitled to a reply on the whole case, independently of what is urged in reply for Frost.

Lord DENMAN, C. J.—As you ask a separate reply for Williams and Jones, we think that each case must be heard quite separately.

Sir *F. Pollock*, for the prisoner Frost.—In this case two great questions arise:—first, whether the delivery of a list of witnesses ten days before the trial, but five days after the delivery of the copy of the indictment and list of the jurors, is sufficient?—and secondly, whether it was competent to take this objection at the time at which it was taken, namely, when the first witness was called? I propose, in the first place, to consider the construction of the statute 7 Anne, c. 21, together with the other statutes, and, secondly, those authorities that throw any light on the construction that ought to be put on acts of Parliament; and, thirdly, the authorities of the Scotch law, with respect to the list of witnesses, as by the stat. 7 Anne, c. 21, the English law of treason was introduced into Scotland, and by the same statute the law of Scotland was imported into England, as to the delivery of a list of witnesses, but not as to the period of ten days. As to the first point, by the stat. 7 Will. 3, c. 3, persons accused of treason were to have a copy of the indictment, but not the names of the witnesses, (which in this statute meant not a list of the witnesses to be called, but a copy of the

names on the back of the indictment), and this copy of the indictment was to be delivered five days before the trial, on the conditions of the attorney requiring and paying for it; and by sect. 7 of the same statute there is a positive direction to deliver a list of the jury two days before the trial, and free of expense. By the stat. 7 Anne, c. 21, sect. 11, it is enacted, that when any person is indicted for treason or misprision of treason, a list of the witnesses to be produced on the trial, and of the jury, mentioning the names &c., of both, "be also *given at the same time* that the copy of the indictment is delivered to the party indicted, and that the copies of all indictments for the offences aforesaid *with such lists*" shall be delivered to him ten days before the trial, in the presence of two or more credible witnesses. The first question is, whether the words, "*at the same time*" have a clear meaning?—I should say that they had—and as the Legislature have added the words "*with such lists*," I should submit that no doubt whatever can exist. The next enactment is the Jury Act, 6 Geo. 4, c. 50, s. 21. That act provides that the list of jurors and indictment shall be delivered ten days before the arraignment, but it leaves the list of witnesses as it stood on the statute of Anne, and I submit that the statute of Anne, is not, so far as it regards the list of witnesses at all affected by the stat. 6 Geo. 4, c. 50, s. 21; but that statute makes one alteration, which is, that the words ten "days before *arraignment*" as to the list of jurors and the delivery of the indictment, are substituted for "ten days before *trial*," which are the words of the statute of Anne, *but that was merely adopting the true construction of the statute of Will.* 3, because it had been decided in that statute, that the word *trial* meant *arraignment*. It is so laid down by Mr. Justice *Foster* (*a*), and Mr. Justice *Blackstone* (*b*) cites Mr. Justice *Foster*, and adopts what he says. The first case which occurred on the statute of Anne, was that of Lord George Gordon (*c*), and there the Attor-

(*a*) Fost. Cr. Law, 230.
(*b*) 4 Com. Ch. 27.
(*c*) 21 St. Tr. 648; Doug. 569, 1st ed., and 591, 2nd ed.

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ney-General applied "for a rule upon the sheriff to deliver to the prosecutor a list of the jurymen *he intended to return* on the panel, in order that the prosecutor might be enabled to deliver such list to the prisoner, according to the provisions of the statute of Queen Anne *at the same time* with the copy of the indictment." This was granted, and the form of the rule is given in a note both in the report in Douglas, and in the State Trials.

TINDAL, C. J.—That was not the list of witnesses.

Sir *F. Pollock*.—The Attorney-General had got that; and I only cite the case to shew that the copy of the indictment and the lists are to be delivered at the same *time* and not at the same *interval*. Since the trial of Lord George Gordon, the copy of the indictment and the list of jurors and the list of witnesses have always been delivered all together, and at the same time. This was so in the *case* of *Hardy* v. *Horne Tooke* in 1794 (*a*); in *Crossfield's case* in 1796 (*b*); in *M'Lean's case*, tried at Quebec in 1797 (*c*); in *O'Coigley's case*, tried in 1798 (*d*); in *Watson's case*, tried in 1817 (*e*); in *Brandreth's case*, in the same year (*f*); and *Thistlewood's case*, in 1820 (*g*); and in *Col. Despard's case*, in 1803 (*h*): in all these the delivery was simultaneous. It has been said that we can produce no authority to shew that a delivery of the lists at different times was bad, but the reason is that no one before now has thought that the words "at the same time" meant, at a different time. There may be important points in which a prisoner may be injured by the lists and the copy of the indictment not being delivered together. The list of the witnesses delivered in this case was headed "A list of witnesses to be produced on the trial of John Frost, upon an

(*a*) 24 St. Tr. 199.
(*b*) 26 Id. 1.
(*c*) Ib. 721.
(*d*) Ib. 1191.
(*e*) 32 Id. 1.
(*f*) Ib. 755.
(*g*) 33 Id. 68.
(*h*) 28 Id. 345.

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indictment found against him and others for high treason, for proving the said indictment." There might be two indictments, and there is nothing to shew which indictment this list might refer to.

ALDERSON, B.—Can the inconvenience alter the construction of the act of Parliament? Are not all acts of Parliament to be construed according to the exact meaning of their words, unless that construction would lead to some manifest absurdity?

Sir *F. Pollock*.—If a statute prescribes a state of things for the benefit of a prisoner, no one can deprive him of it. Two witnesses are required as to the delivery of the list of witnesses: would the evidence of one witness be sufficient, coupled with finding the list on the prisoner, with an indorsement in his handwriting, that he had received it ten days before the trial? I should say that it would not, the words of the statute being express. I come now to the second head of my argument, as to the construction to be put on acts of Parliament, and from the cases it appears, that where a statute has directed a particular mode of proceeding, or a particular form to be observed, that mode of proceeding, and that form must be observed, and no other will be sufficient. [In support of this part of his argument Sir *F. Pollock* cited the cases of *Lovelace* v. *Curry* (*a*), *Taylor* v. *Fenwick* (*b*), *Vaux* v. *Vollans* (*c*), *Rex* v. *Harvey* (*d*), *Spears* v. *Smith* (*e*), *Eicke* v. *Nokes* (*f*), *Wadsworth* v. *Marshall* (*g*), *Stunnell* v. *Tower* (*h*), *Akehead* v. *Stocks* (*i*).] From the case of *Jones* v. *Lake* (*j*), it appears, that under the Statute of Frauds, 29 Cha. 2, c. 3, it was not necessary that all the three witnesses to a will of lands should have been pre-

(*a*) 7 T. R. 631.
(*b*) 3 B. &. P. 553 n.
(*c*) 1 N. &. M. 307.
(*d*) 1 Wils. 164.
(*e*) 6 Esp. 138.
(*f*) 1 M. & M. 303.
(*g*) 3 Tyr. 228.
(*h*) 4 Tyr. 862.
(*i*) 1 M. & P. 346.
(*j*) 2 Atk. 176 (*n*), and 6 Cruise Dig. 69.

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sent at the same time; but now by the stat. 1 Vict. c. 26, it is necessary that the two witnesses to a will must be present "*together.*" [Sir *F. Pollock* also cited the cases of *Goss* v. *Jackson* (*a*), *Rex* v. *Rickets* (*b*), *Jones* v. *Smart* (*c*), *Rex* v. *Inhabitants of Barham* (*d*), *Notley* v. *Buck* (*e*), *Brandling* v. *Barrington* (*f*), *Vaux* v. *Ansell* (*g*), *Bates* v. *Pilling* (*h*), *Wagget* v. *Shaw* (*i*), *Richards* v. *Stuart* (*j*), *Smith* v. *Crump* (*k*), *Rex* v. *Justices of Kent* (*l*), *Rex* v. *Justices of Cambridgeshire* (*m*), and in the matter of *Flounders* (*n*).] I now come to the authorities on the law of Scotland, from which it appears, that in that country the law respecting the list of witnesses and the copy of the indictment is, at least, as old as the reign of Charles the Second, as by an act of the Scottish Parliament, passed in the year 1679, regulations were made on this subject. Baron Hume, in his work on Crimes (*o*), says, "In addition to the copy of the libel (*p*), the statute of Charles the Second orders that the panel (*q*) be *at the same time* served with a copy of the list of the witnesses to be called against him, and of the persons of assize (*r*) who are to be cited for his trial." These very expressions are copied into the statute of Anne, with the addition of ten days, and the words being copied from the one statute into the other they must have the same meaning in both; and in the Scottish act the words "at the same time" can bear no other meaning than that which I contend for, as in that act no number of days is mentioned. In Scotland the period of service of these documents was not specified in the statute of Charles, but was

(*a*) 3 Esp. 198.
(*b*) A. & E. 537; and 1 N. & P. 680.
(*c*) 1 T. R. 44.
(*d*) 8 B. & C. 99.
(*e*) Id. 160, & 2 M. & R. 68.
(*f*) 6 B. & C. 467.
(*g*) 1 B. & P. 224.
(*h*) 4 Tyr. 231.
(*i*) 3 Camp. 316.
(*j*) 10 Bing. 319, and 3 M. & S. 774.
(*k*) 1 Dowl. P. C. 519.
(*l*) 3 B. & Ad. 250.
(*m*) Ib. 887.
(*n*) 4 Id. 865.
(*o*) Ch. 8 of the 3rd ed., published in 1829.
(*p*) The libel is the accusation.
(*q*) The panel is the accused party.
(*r*) The persons of assize are the jurors.

regulated by an act of adjournal, which is an order of court similar to the acts of sederunt in civil cases, and to the recent general rules of practice in this country. They were equivalent to law, but would not contravene an act of Parliament. [He cited several cases from the same chapter of Hume on Crimes, in which for informalities in the list of witnesses the public prosecutor "deserted the diet."]

ALDERSON, B.—Is not deserting the diet something similar to quashing the indictment?

Campbell, A. G.—I am speaking in the presence of the Lord Advocate and Sir William Rae; and I believe I am correct in saying, that if the public prosecutor deserts the diet, loco et tempore, he may begin again and commence another prosecution for the same offence, but, if he deserts it simpliciter, he cannot.

Sir *F. Pollock*.—There are several cases referred to by Baron Hume. [He cited from the same chapter of Baron Hume's work, the cases of David Stogeld, Philip Mackenzie, Gabriel Hyatt, and Margaret Buckstone; but in all these cases, except that of Hyatt, the objection was taken before the jury were sworn. In *Hyatt's case*, the objection was, that the list of witnesses was not signed by the public prosecutor. The objection was taken after the jury were sworn, and it prevailed.] In Alison's Practice most of these cases will be found, and it is there stated that "statutory provisions cannot be supplied by equipollents." I am far from making an admission that the objection to the delivery of the copy of the indictment cannot be made after plea. The case of Rookwood (*a*) does not go to that extent, it merely decides that a prisoner charged with high treason could not, under the statute of Will. 3, demand a copy of the

(*a*) 13 St. Tr. 154.

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indictment during his trial, but, under that statute, he was only entitled to it if he demanded it, and on paying for it. The good sense of the matter certainly seems to be, that the prisoner should object to the non-delivery of the copy of the indictment when he is called on to plead—to the non-delivery of the list of the jurors when the jury is about to be called, and to the non-delivery of the list of witnesses when the first witness is called. A prisoner is not an actor in any of these proceedings, and is he to be called upon to decide, and to decide against himself, a thing so difficult that learned Judges have adjourned it from Monmouth to London?

Lord ABINGER, C. B.—You are in the same situation as if the prisoner had just pleaded, and the jury had just been charged.

Sir *F. Pollock*.—There was a work published in 1709, which Mr. Justice *Foster* says (*a*) was published by order of the House of Lords, and which was referred to by Mr. Baron *Gurney* in *Brandreth's case* (*b*). This work is "A form and method of Trial of Commoners in cases of high treason and misprision of treason;" (it has bound up with it a collection of statutes relating to high treason), and it is there laid down (*c*), that the clerk of arraigns "must call to the keeper of the prison to bring such prisoner for high treason to the bar of the Court, and the clerk of arraignments, to distinguish his person, must bid him hold up his hand," &c., "and tell him, if he require a copy of the indictment (paying for it) he shall have it delivered to him five days at least before he be tried for the same, to advise with counsel to plead for him and make his defence;" and at another part of the same book (*d*) there is the following direction to the clerk

(*a*) Fost. Cr. Law, 230.
(*b*) 32 St. Tr. 778.
(*c*) At p. 17.
(*d*) At p. 29.

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of arraigns:—"Ask the Court which prisoner they intend shall be tried first, and the keeper to set him to the bar and call to know if the witnesses against him are all ready, and take away the other prisoners from the bar. Ask him who is to be tried if he have had a copy of the panel of the jury delivered to him two days (or more) since? If he should deny it, some witness for the Queen, who delivered the copy to him, must prove the delivery thereof" (*a*).

TINDAL, C. J.—The book from which you are citing was published by order of the House of Lords (*b*).

Sir *F. Pollock*.—This furnishes a powerful argument that the time for objecting to the indictment is at the time of pleading, and that, therefore, the time for object-

(*a*) In this work, at p. 20, will be found the following note:—"A caption of an indictment for high treason or misprision of treason, with the true copy of the indictment itself as incident thereto, to be delivered to the party indicted five days at least before he plead, and a witness must attend the Court at the time of the prisoner's pleading to prove the delivery of the copy of the indictment to the prisoner if there should be occasion." The entire caption, and so much of the indictment as is set out, are in the Latin language, with abbreviations.

(*b*) At the commencement of the collection of statutes is the following order of the House of Lords:—

"Die Mercurii, 20 Aprilis, 1709. It is ordered by the Lords spiritual and temporal in Parliament assembled, that when the several transcripts or collections of the statutes now in force relating to high treason and misprision of treason, and the methods of trial for those crimes shall be subscribed by all the Judges, they shall be forthwith printed and published by her Majesty's printers for the better information of the people of Great Britain in relation to those laws.

"Matt. Johnson,
Cler. Parliamentor."

And at the beginning of the forms to be observed on the trials is an approval in the following form:—

"We do approve of this method of trials:

"J. Holt.
"Thos. Trevor.
"Edw. Ward.
"John Powell.
"Littleton Powys.
"Jo. Blencowe.
"H. Goulde.
"R. Tracy.
"Thos. Bury.
"Ro. Price.
"Robert Dormer.
"S. Lovell."

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ing to the list of witnesses is when the first witness is called. Indeed where is the distinction between objecting to a single witness or to the whole list. The prisoner (as is conceded) might object to the want of addition to the name of a single witness, and his objection is to an incorrect compliance with the statute, being in effect no compliance at all.

ALDERSON, B.—You will not suppose that I wish you to admit that the objection to the non-delivery of the indictment must be taken before plea, but if that be so, and the copy and the lists must be delivered together, would not the waiving of that objection by pleading also waive it as to the lists, as being an admission that the copy of the indictment was duly delivered with the lists of jurors and witnesses?

PARKE, B. — The answer to that question given at Monmouth was that, by pleading, the prisoner waived the objection so far as it related to the copy of the indictment; and that he waived the objection so far as it related to the list of jurors, by not objecting to the swearing of the jury; but that he still might object to a want of a due delivery of the list of witnesses, when the first witness was called: whether that is a good answer is another question.

Sir *F. Pollock*. — Upon what principle of law is it to be said, that a prisoner, by pleading to an indictment, admits the jury list to be correct. If in the list of witnesses the principal witness is mis-described, and notwithstanding that the prisoner found him out, would it be enough to say that you found the witness and pleaded to the indictment? The law has said, that the prisoner shall have a correct list of witnesses, and he is entitled to it. If no list of witnesses is delivered, the prisoner may conclude that the Crown intends either to enter a nolle prosequi, or that he is to be admitted as a witness. Is the prisoner

who is to be fired at, to be bound to inquire whether the guns are loaded with powder only, or with powder and ball? Is he to send to the other party to know what their intentions are? I say that it is the duty of the persons who conduct the prosecution to attend to these things; and if there had been no list at all delivered, could the Crown have said, "We are free to do as we please, because you have pleaded to the indictment?"

TINDAL, C. J.—If there had been no list at all, they could have called no witnesses.

Sir *F. Pollock*.—A list not according to the act is, in effect, no list at all. We had, in fact, three lists.

TINDAL, C. J.—An irregular list may be different from no list at all.

Sir *F. Pollock*.—If a list were delivered only three days before the trial, would that irregularity be waived by the plea? If the list was delivered the night before the trial, could it be said that the prisoner submitted to be tried, and had thereby waived the objection? How far is the life of a prisoner to be sported with by the blunders of the prosecutors? If the list had been delivered less than ten days, I should not now have been arguing this case. I have been more than thirty years at the bar, and during the proceedings I have considered hour by hour when I ought to take the objection; and yet, the Attorney-General knowing that the objection was to be taken, plays off a sort of Nisi-Prius advantage over me, to get rid of it. I submit that the objection was taken at the proper time, and that the list of witnesses not being delivered according to the statute, the prisoner is in the same situation as if no list had been delivered at all.

Campbell, A. G.—No one can doubt that Sir *F. Pollock* did well to keep back this objection till the jury were

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charged with the prisoner. He might have made it when the prisoner was brought up to plead, or when I moved that Mr. Frost should be first tried; but if the objection had been taken at either of those times, the only effect of it, if it had prevailed, would have been to have caused the trial to be postponed for a few days. And whatever may be the result of this argument Mr. Frost has already had an advantage, as he has had a longer opportunity of preparing for his trial than he was entitled to, and any irregularity that may have occurred was out of favour and indulgence to him. With respect to the construing of statutes, your Lordships are, as I apprehend, to ascertain the meaning of the Legislature, and having ascertained that you are bound by it; and if a form of proceeding is prescribed by the Legislature it must be followed, and the doctrine of equivalents and of equipollents must be entirely dismissed: but in ascertaining what is the meaning of the Legislature it may be material to see what was their intention, and in that view it may be important to consider what would or what would not be of advantage to the prisoner as one way of arriving at their meaning. What was the object of the statutes of William 3 & Queen Anne? Was it for a prisoner to lie by and defeat the ends of justice? No:—to enable him to meet the charge, and to know who were to be the jurors to try him and the witnesses to be called against him. The two statutes being in pari materia must be construed together, and the preamble of the statute of Will. 3, recites, that nothing is more reasonable than that persons prosecuted for high treason and misprision of treason "should be justly and equally tried, and that persons accused as offenders therein should not be debarred of all just and equal means for defence of their innocencies in such cases." The Scottish statute of 1672 requires simultaneous service, but the statute of Anne is framed in a different manner; and, as I submit the words of it admit of two constructions—your Lordships will say which is the right. One construction

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is that the services must be simultaneous; but if I shew that that construction is calculated to defeat the ends of justice, and that the other construction is calculated to carry into effect the intention of the Legislature, your Lordships will not hesitate as to which construction you should adopt. By the statute of Anne it is enacted that when any person is indicted for high treason, "a list of the witnesses that shall be produced on the trial for proving the said indictment and of the jury, mentioning the names, profession, and place of abode of the said jurors and witnessess, be also given *at the same time* that the copy of the indictment is delivered." Sir *F. Pollock* wishes to stop there, but it proceeds, "and that copies of all indictments for the offences aforesaid, *with* such lists, shall be delivered to the party indicted *ten days before the trial*" in the presence of two credible witnesses. This gives the time, ten days, and the words, "*at the same time*," may mean at the same instant of time, or they may mean at the same interval of time; and if the latter be the meaning, these words would designate that the same period of time should apply to the one and to the other, and would import that the delivery was not to be at the same instant of time, but at the same interval of time. If the words admit of two constructions, your Lordships will put on them that construction which carries the intention of the Legislature into effect. There is no advantage in having all the three papers delivered together, and it is plain that the Legislature thought so, as by the stat. 6 Geo. 4, c. 50, they are dissevered. Indeed, it is manifest, that it is better for the prisoner to have the copy of the indictment first, then the jury list, and then the list of witnesses, the last being ten days before the trial, than to have the whole of them together, only ten days before his trial; and if there can be no good service except it be simultaneous, prisoners will be prevented from having information which could otherwise be given to them, and in the present case Mr. Frost would have lost five days, which he had to consult coun-

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sel on the indictment, and five days for his agents to make inquiries as to the jurors, and his present objection, therefore, resolves itself into this—that he was allowed too much time to make his defence—and a decision in his favour on this point would injure every person that is tried for high treason hereafter. Upon the statute of Anne, I submit, that the word "with," is used cumulatively. I may say A. and B., *with* C. and D. and other letters, form the alphabet; the word *with*, there, merely meaning that one is added to the other.

Lord ABINGER, C. B.—"With" may mean no more than "and."

Campbell, A. G.—The word "but" sometimes means "without"—of which the saying, "Touch not a cat *but* a glove"—meaning without a glove—is an example. Suppose that your Lordships decided that the services must be simultaneous, justice would be defeated in many cases. Mr. Justice Foster (*a*) gives instances where the challenges by the prisoners, both peremptory and for cause, exhausted the jury panel; and the Court in each instance ordered a new panel, and adjourned for the fresh jurors to be summoned. If that were to occur now, and the service of the copy of the jury list must be simultaneous with the copy of the indictment, justice would be defeated, as the jury are not called till after the prisoner has pleaded to the indictment.

PARKE, B.—That would be so, unless the plea were struck out.

Campbell, A. G.—On the construction I contend for, nothing would be required but a postponement of the trial to give time to serve a copy of the new list of jurors.

(*a*) Fost. Cr. L. 63.

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With respect to the construing of acts of Parliament, I respectfully bow to the canon of construction laid down by one of your Lordships; but I would add that that does not apply to cases where the words admit of two constructions. If the statute of Anne were to be construed literally, it might be said, that if one witness's name or abode, or one juror's name or abode, were without an addition, it would vitiate the whole list, because the list is to be a list of all, with abodes and additions; but it is well settled that an objection of that sort goes to the poll, and not to the array. The words of the statute of Anne are "*ten* days." It might be plausibly argued, that the service was bad if it was made fifteen days before trial, instead of ten; and the statute of Will. 3 might be called in aid, because the words there are "five days, *at the least*," and "two days, *at the least*," which words do not occur in the statute of Anne; and it might be argued, that from this, it appeared that the Legislature meant ten days exactly. So the statute of Anne says, "ten days before the trial." On the mere words, the prisoner might be called on to *plead* to the indictment on the next day after that on which he received it; but it has been held, that, on the correct construction of this act, the word "trial" means arraignment. In *East's* P. C. (*a*), it is said, that, "though the words of the statute of Will. are, "that the prisoner shall have a copy of the panel duly returned by the sheriff; yet if the copy be delivered before the return of the precept it will be sufficient, within the words and intent of the act, if the prisoner have the advantage of it in the time allowed by law before his trial, the intent of which was to give him an opportunity of preparing his challenges;" and for this, *Rookwood's case* (*b*), and *Greg's case* (*c*), are cited. So it might be said, that a

(*a*) P. 113.

(*b*) 13 State Trials, 154.

(*c*) 1 East, P. C. 113. It is there laid down that, after pleading, it is too late to object either to the want of a copy of the indictment or to any insufficiency, for that admits it to be sufficient.

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copy of the list of jurors could not be given till they were summoned; and so in East's P. C. (*a*) it is said, that certain formal objections, such as miswriting and false Latin, must be taken before plea; "and in the cases of *Vaughan*, *Sullivan*, and *Layer*, the Court refused to hear such objections after plea, though it is still open to the prisoner afterwards to move in arrest of judgment." These are the various instances in which the Courts, to effectuate the real intentions of the Legislature, have put a construction different from the mere literal construction of the clauses of acts of Parliament. Mr. Justice *Foster*, Mr. Justice *Blackstone*, and Mr. Serjeant *Stephen*, all say that the copy of the indictment and the two lists must be served ten days before the trial, but do not say that the service must be simultaneous. The cases of *Lovelace* v. *Curry*, *Vaux* v. *Vollans*, and many other cases, have been cited as to the construction of statutes. I do not impugn those decisions, or the doctrines contained in them; neither do I dispute the cases which decide that service of an original subpœna at a different time is not a service at the same time, for, if in this case the service of the copy of the indictment and the two lists must be simultaneous, cadet questio; but I am contending that the other is the correct meaning of the statute. It is also said that your Lordships must construe the statute of Anne according to the Scotch Act of Charles the Second, but on that I will observe, that the forms of the Scotch law are very different from ours. In Scotland there is a public prosecutor and no Grand Jury. The libel is prepared by the public prosecutor. The accused, if not in custody, must be cited, and there must be fifteen days between the citation and the trial. In cases of high treason the English law was by the statute of Anne introduced into Scotland, and not the Scotch law into England. In cases of treason in Scotland there is by that statute a Grand Jury, and the accused are tried under a royal com-

(*a*) P. 110.

mission, in the same way as in England (*a*); and this being so, it is supposed that the bar of both countries might attend and plead there. If it had been intended to have introduced the Scotch law into England, the act of adjournal would have been introduced, by which it is ordained that the list of the witnesses shall be indorsed on the copy of the indictment. The Jury Act (6 Geo. 4, c. 50, s. 21) leaves the list of witnesses as it stood on the statute of Anne, and, on trials for treason in the Court of King's Bench, it points out different times for the delivery of the list of the jurors and the copy of the indictment. Was it intended that a person tried in the Court of King's Bench should be in a worse situation than if he were tried elsewhere? and yet in the King's Bench the list of witnesses stands on the statute of Anne, the copy of the indictment is to be delivered ten days before the arraignment, and the list of witnesses ten days before the trial. I now come to the second point, which is that the objection came too late. It is not to be assumed that there was no list at all. A list de facto was served on the 17th of December, and was bonâ fide served in pursuance of the statute, the only objection being, that it was not served at the same time as the copy of the indictment. Is that more than irregularity? Is that a nullity? I am now assuming that simultaneous service is directed by the act; and the question is, whether, if it was irregularity only, it is an objection that can be brought forward as a substantive defence, even after all the evidence is gone through. The objection might have been taken before plea. When Mr. Frost was arraigned, why did he not take the objection? Why not before the jury were charged with him? and can he afterwards make an objection to an irregularity which he might have made before? The objection might have been made earlier, and public justice required that it should be. It is a general rule, both in civil and criminal

(*a*) This is provided by the stat. 7 Anne, c. 21, ss. 1 & 3.

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proceedings, that any objection to an irregularity must be taken in the earliest stage in which it can be taken, or it is waived. In this very case, an objection was taken in arrest of judgment by Mr. Geach (Mr. Frost's attorney) after the counsel were gone, that one of the jurors was misdescribed, and the objection was overruled, as being too late.

ALDERSON, B.—If by the statute certain things are to be done before trial, and the party is tried and does not object, can he object to them afterwards? he might have prevented the trial if he had chosen, but he did not do so (*a*).

Campbell, A. G.—Mr. Justice Foster (*b*) gives the following heads:—"what privileges the prisoner is entitled to;—what is incumbent on him *previous* to his trial;—what *during* the trial;"—and I take it to be a well-established principle, that, if a party by plea or otherwise waives an objection that he might have taken, he cannot take it afterwards. After plea a defendant cannot move to quash the indictment; a prisoner could not, even before the statute 7 & 8 Geo. 4, c. 28, plead misnomer after pleading in bar. Where a prisoner challenges for cause, he must shew all his causes together (*c*). If a witness answer that which may criminate himself, he must answer throughout. In the case of *Rex* v. *Stone* (*d*) it was held, that the presence of a party at the time of a proceeding dispensed with a summons. So in the case of *Rex* v. *Watson* (*e*) for high treason, a witness was examined who

(*a*) If an indictment for felony be removed into the Queen's Bench, and be tried as a nisi prius record, and the record be brought down by the prosecutor, the accused party would be entitled to notice of trial. But if, when the case comes on at Nisi Prius, the accused party appear by counsel and call witnesses, it would seem that if convicted he would not be entitled to set aside the verdict, because the notice of trial was given too late, even if such were the fact.

(*b*) Fost. Cr. L. 227.

(*c*) 2 H. P. C. 274.

(*d*) 1 East, 649.

(*e*) 2 Stark. N. P. C. 158.

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was, in the list of witnesses, called Heyward. He was examined without objection. It was afterwards discovered that his name was Heywood, and it was sought to strike out his evidence, but the Court held, that the objection came too late, and ought to have been taken in the first instance. So in the case of *Brunskill* v. *Giles* (*a*), the Court would not grant a new trial because the jury had been summoned by the partner of the plaintiff's attorney, because the proper time for taking this objection was when the jury came to the book to be sworn. So in the case of *Hill* v. *Yates* (*b*), where the son of a juryman answered for, and served instead of, his father, and the cases there cited of persons serving on juries under wrong names, the Courts have uniformly held, that if the objection is not made before the jury are sworn, it cannot be made afterwards. And with respect to witnesses in cases of high treason, the judges at Monmouth laid down this rule, that any objection to the description of any particular witness must be taken on the voire dire, and that it comes too late after the witness is sworn in chief; and if this objection to the list of witnesses might be taken when the first witness is called, it might equally be taken when the tenth was called, or might be set up as a substantive defence; and so might the objection, that one of the persons in whose presence the list was delivered was not a credible witness. I say, therefore, that if there is such an objection to be taken at all, it should be taken at such a time as to give the prisoner a postponement of the trial if he wishes it, but not go to an acquittal.

On a trial for high treason any objection to the description of the witness in the list of witnesses must be taken on the voire dire, and comes too late after the witness is sworn in chief.

GURNEY, B.—In the case of *Rex* v. *O'Coigly and others* (*c*), the prisoner's counsel before the arraignment objected that there were several variations in the copies of the indictments which had been delivered to the pri-

(*a*) 9 Bing. 13.

(*b*) 12 East, 229.

(*c*) 26 St. Tr. 1198.

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soners, and stated that they made the objection with a view to postpone the trials, but the Attorney-General consenting to a postponement of the trials, the objections were waived.

Campbell, A. G.—I will now draw your Lordship's attention to the Scotch law.

Lord DENMAN, C. J.—I now state the opinions of my learned brothers, that your observations on the Scotch law ought to be brought into a very narrow compass, its bearing on the present case being so very remote.

Campbell, A. G.—I will only observe, that, in all the cases cited by Baron Hume, except *Hyatt's*, the objection was taken before the jury were sworn, and that the authority of that case is a little doubtful, as Baron Hume appears to disapprove of it. There, indeed, there was no authenticated list, as it was unsigned, and all the other cases, which are those of lists irregularly served, go to shew that the objection must be taken before the jury are sworn.

PARKE, B.—If the prisoner says that he has had no list at all, at what time do you say the Crown must prove the delivery of the list?

Campbell, A. G.—The Crown might be called on to prove it when the prisoner was tried.

TINDAL, C. J.—The book of 1709 (*a*) says, that the witness is to be called to prove the service, under the statute of Will. 3, before the trial begins.

ALDERSON, B.—If the prisoner by pleading admits a

(*a*) Referred to ante, p. 188.

service of a cotemporaneous list, how do you shew that your list is the same as that which he must be taken to have admitted by his plea?

Campbell, A. G.—I put it that pleading admits the delivery of a regular list, and the Crown must identify their list as the one served. We shew the list that we served, and the plea admits that it was well served.

Sir *F. Pollock*, in reply.—With respect to the construction of statutes, I submit that your Lordships must look at what the statute has said; and I have cited cases to shew what have, in modern times, been the views of the Judges in construing acts of Parliament, and there has evidently been a feeling on the Bench that too loose a construction should not creep in; and I put it that even on the stat. 6 Geo. 4, c. 50, s. 21, the delivery of the copy of the indictment and the lists of jurors and witnesses must be simul et semel, in all cases of treason where the trial is not in the Court of Queen's Bench, although where the trial is in that Court it is otherwise under the provisions of that statute. Mr. Petyt, in his Jus Parliamentarium (*a*), gives

(*a*) P. 66. The passage is as follows:—"The Lord Chancellor Ellesmere's rule, laid down for construction of words in that grand case of the post nati of Scotland in King James the First's time, is this: 'Words are to be taken and construed, saith he—1. Sometimes by extension; 2. Sometimes by restriction; 3. Sometimes by implication; 4. Sometimes a disjunctive for a copulative; 5. A copulative for a disjunctive; 6. The present tense for the future; 7. The future for the present; 8. Sometimes by equity out of the reach of the words; 9. Sometimes words taken in a contrary sense; 10. Sometimes figuratively, as continens pro contentò; 11. And many other like.' And of all these, he says, examples be infinite as well in the civil law as common law. Now any one that reads this will easily judge what the scope and consequence of the Chancellor's rule may be, and he may as easily discern how far it is capable of improving, to baffle and elude any law whatsoever, and wrest it from its genuine and native sense to what you please."

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some rules of construction which are laid down by Lord Ellesmere, who says that words are taken and construed sometimes by extension, sometimes by restriction, sometimes a disjunctive for a copulative, and the like; upon which it is observed, how easy it is to baffle and elude any law, and wrest it from its genuine and native sense.

Lord ABINGER, C. B.—I do not know whether you cite Lord Ellesmere as a reflection upon the Judges who construed the statutes, or on the legislators who made them. It is a very common error to blame Judges for their construing of statutes, but some of the blame belongs to the framers of them. You say that we now construe them more literally than Judges did formerly, and perhaps that is so; but still some of them, if construed literally, would lead to much absurdity.

Sir *F. Pollock*.—I only say that Judges do not now take those liberties with acts of Parliament which they did more than a hundred years ago.

Lord ABINGER, C. B.—One reason for that is, that more than a hundred years ago acts of Parliament were very short, and were to be applied to a variety of cases; but now they are very long, and some of them are framed with all the beauties of style to be gathered from the office of the special pleader, and the office of the conveyancer also.

Sir *F. Pollock*.—The prisoner's being willing to plead has nothing to do with the list of the jury or the list of witnesses. In the book of 1709 there is a direction to have the prisoner asked, if he has had the copy of the indictment. Here the officers of the Crown made a mistake, and lie by, in hopes that the prisoner may let it slip and pass over. If it was meant to insist that the objection should have been taken earlier, the prosecutors should, in

the form given in the book of 1709, have asked the prisoner if he had got the copies of the indictment and the lists.

Lord ABINGER, C. B.—The old form was for the Court to do it.

Campbell, A. G.—It has not been done for half a century.

ALDERSON, B.—There is a direction in the book of 1709 for asking the prisoner as to his name.

Sir *F. Pollock*.—That is probably altered by the stat. 7 & 8 Geo. 4, c. 28, s. 1. On the whole case I have to contend, that when an act of Parliament says the *same* time, it means the same time, and that the proper time for objecting to the list of witnesses is when a witness is called, and that if some irregularities cannot be cured—none can.

The case having been considered by the Judges, a majority of their Lordships, in the proportion of nine to six, were of opinion that the delivery of the list of witnesses was not a good delivery in point of law; but a majority of their Lordships, in the proportion of nine to six, were of opinion that the objection to the delivery of the list of witnesses was not taken in due time, and the Judges agreed, that if the objection had been made in due time the effect of it would have been a postponement of the trial, in order to give time for a proper delivery of the list, and their Lordships held the conviction right (*a*).

(*a*) We believe that Lord Denman, C. J., Tindal, C. J., Lord Abinger, C. B., Bosanquet, J., Gurney, B., and Maule, J., were

PROMOTIONS.

IN Michaelmas Term, 1839, the Hon. Mr. Baron *Maule* was appointed one of the Judges of the Court of Common Pleas, *vice* the Right Hon. Sir *John Vaughan*, Knight, deceased.

In the same Term, Sir *R. M. Rolfe*, Knight, her Majesty's Solicitor-General, was appointed one of the Barons of the Exchequer, *vice* the Hon. Mr. Baron *Maule*.

In the Vacation after Michaelmas Term, 1839, *Thos. Wilde*, Esq., one of her Majesty's Serjeants at Law, was appointed her Majesty's Solicitor-General, *vice* Sir *R. M. Rolfe*, Knight.

In the Vacation after Hilary Term, 1840, *R. B. Armstrong*, Esq., *G. J. Turner*, Esq., *David Dundas*, Esq., and *Richard Bethell*, Esq., were appointed her Majesty's Counsel Learned in the Law.

In the same Vacation, *J. Manning*, Esq., *J. Halcomb*, Esq., *W. F. Channel*, Esq., *W. Shee*, Esq., and *D. C. Wrangham*, Esq., were called to the degree of Serjeant at Law.

of opinion that the objection to the delivery of the list of witnesses was wholly unfounded; and that Alderson, B., Coltman, J., and Rolfe, B., were of opinion that the delivery of the list of witnesses was not a good delivery in point of law, but that the objection was made too late: Littledale, J., Parke, B., Patteson, J., Williams, J., Coleridge, J., and Erskine, J., being of opinion that the delivery of the list was not a good delivery, and that the objection was taken at the proper time. Mr. Frost's sentence was commuted to transportation for life.

COURT OF EXCHEQUER.

Sittings at Westminster after Michaelmas Term.

BEFORE LORD ABINGER, C. B.

THE ATTORNEY-GENERAL *v.* BOND.

1839. *Nov.* 28*th.*

INFORMATION by the Attorney-General against the defendant for penalties under the statute 3 & 4 Will. 4, c. 53, s. 44. The information stated, that certain merchants, to the Attorney-General unknown, had imported certain goods, to wit, 230 gallons of foreign brandy, of the value of 310*l.* 10*s.*, which goods were liable to the payment of duties of customs, and were deposited by a certain officer of customs, to wit, one J. D., for security of such duties in certain places of security in the United Kingdom; that is to say, in the Queen's warehouse; and that the goods were, without payment of the duties, removed by persons unknown from the said place of security; and that the defendant did assist in the removal, whereby he had forfeited treble the value of the goods, which the commissioners of her Majesty's customs had elected to be sued for in this behalf. There were also six other counts for knowingly concealing the goods, and for assisting in unshipping them, &c. Plea—Not guilty.

On the part of the Crown, a witness named Collins was called; and, with a view to cross-examine him, it was proposed by *Humfrey*, for the defendant, to put into the witness's hand the affidavit made by the witness, and de-

On the trial of an information by the Attorney-General for penalties, the defendant (who had been held to bail) had subpœnaed the officer from the Queen's Remembrancer's Office to produce the affidavit on which he had been held to bail, with a view of being able to give it in evidence to cross-examine the person who had made the affidavit, if he should be called as a witness on the trial. The person who made the affidavit was called as a witness on the trial, and, for the purpose of cross-examining him the defendant's counsel wished to put in the affidavit:—*Held*, that the officer was bound to produce it, and that the defendant had a right to make use of it in this way; but that if the affidavit was made by another deponent besides the witness, and related to other persons besides the defendant, the latter would be only entitled to use so much of the affidavit as was sworn by the witness, and as related to the defendant himself.

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posited in the office of the Queen's Remembrancer, upon which the writ of capias had issued, to hold the defendant to bail in this case, and which the proper officer was subpœnaed to produce.

Jervis and *Kaye*, for the Crown, objected to the production of the affidavit, on the ground that the production of such affidavits would lead to great inconvenience. They also stated, that there was no instance of such an affidavit ever having been used in this way on any former occasion.

Lord ABINGER, C. B.—I am clearly of opinion, that the defendant is entitled to use it in the manner proposed by his counsel.

Jervis.—The affidavit is the joint-affidavit of the witness Collins and another, and it relates to other persons besides the defendant.

Lord ABINGER, C. B.—The defendant will be only entitled to use so much of the affidavit as is sworn by the witness Collins, and which relates to the defendant himself. Anything which relates to other persons, or which is sworn by any other deponent, cannot be made use of by the present defendant on this trial. Let me see the affidavit.

The affidavit was handed to his Lordship, who observed, that he did not see anything in it which would be of any use to the defendant.

The affidavit was given back to the officer.

The jury could not agree, and were discharged by the consent of the counsel for the Crown.

Jervis and *Kaye*, for the Crown.

Humfrey and *Mellor*, for the defendant.

[Attornies—*Walford*, and *Rickards & Walker*.]

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Nov. 28th.

A notice to produce a letter from the defendant to the plaintiff was served on the plaintiff's attorney at a quarter before nine on the night before the trial. It was a letter on the subject of the promissory note on which the action was brought, and was an answer to a letter from the plaintiff to the defendant on the same subject:—*Held*, that the notice to produce was served too late.

In a former action between the same parties, in which the plaintiff sued in person, certain statements were made in the defendant's plea which were not denied by the replication, which only denied other parts of the plea; there had been a trial, but no judgment:—*Held*, that neither the issue delivered by the plaintiff himself, nor the nisi prius record in the former action, was admissible in evidence, as proof of an admission of the facts stated in the plea in the former action, and not denied by the replication.

In an action on a promissory note the defendant pleaded, that the note was given under a parol agreement that the defendant should renew it when due, by paying discount and giving another note, and that he offered to do so; the plaintiff took issue on this plea:—the Judge at the trial would not prevent the defendant from going into evidence in support of this plea, although it was suggested that the plea was bad, as setting up a parol agreement to vary a written instrument, because the plaintiff had taken issue on the plea.

Where a defendant pleaded that a promissory note, on which the plaintiff sued as payee, was given to the plaintiff as trustee for W., and that W. had made a bargain for its renewal on certain terms stated in the plea, and the plaintiff took issue on this plea:—*Held*, that evidence of the actual bargain made by an agent of the defendant with W. might be given in evidence, but that evidence of anything that W. said at any other time was not receivable.

ASSUMPSIT by the plaintiff as payee against the defendant as maker, of a promissory note for £30, dated on the 28th of September, 1838, and payable one month after date to the plaintiff or his order, for value received. Second count, upon an account stated. Pleas—1st, to the second count, non assumpsit; 2nd, that a person named Whitmarsh had agreed to lend the plaintiff a sum of £200, as a continuing loan, at the rate of £60 per cent. discount, on notes renewable every month, and that this was one of the notes, given in pursuance of that agreement to the plaintiff as attorney and trustee for Whitmarsh (*a*); 3rd plea, that on the 28th of April, 1838, it was agreed between the defendant and Whitmarsh, that Whitmarsh should lend the defendant £200, or such part thereof as the defendant should require, and that it should be a continuing loan for a long space of time, to wit, for more than twelve months, and so long as the defendant should pay interest as hereafter mentioned; and that it was further agreed, that the defendant should pay Whitmarsh one shilling in the pound per month for such

(*a*) A precisely similar plea was held to be bad in the case of *Holt* v. *Miers*, 5 M. & W. 168, and judgment was given for the plaintiff, non obstante veredicto, after a verdict had been found for the defendant upon it.

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sums as Whitmarsh should lend the defendant, and that at the time any part of the £200 was advanced, the defendant should make and deliver his promissory note to Whitmarsh, which notes were to be renewable every month, on payment by the defendant to Whitmarsh of one shilling in the pound as discount on each renewal. The plea then went on to state an advance of £30 in April, 1838, and renewals and payments of discount according to the agreement, till the making of the present note, which was stated on the plea to have been given to the plaintiff as the attorney and trustee of Whitmarsh; and in this plea it was further averred, that when the note became due the defendant was ready and willing to renew it, and also to pay the discount according to the agreement, but that Whitmarsh did not nor would, nor did nor would the plaintiff renew it, (concluding with a verification).

Replication to the 2nd and 3rd pleas: that the defendant of his own wrong, and without the causes or cause by him in those pleas or either of them alleged, broke his promise on the 1st count alleged.

It was opened by *Carrington* for the defendant, that Mr. Whitmarsh had agreed to advance money to the defendant to the extent of £200, at the rate of £60 per cent., and this was to be secured by promissory notes payable at one month, but which notes were to be renewed from month to month, on the defendant paying one shilling in the pound as interest for each month, on the monthly renewal of each note; and that in pursuance of this bargain money was advanced by Whitmarsh to the defendant in April, 1838, the promissory notes being given and regularly renewed down to the time of the giving of the note which was the subject of the present action, which was given to the plaintiff and in his name as a trustee for Whitmarsh, but which when due had not been renewed, as the plaintiff had brought the present action on

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the 1st of November, and before the defendant had had an opportunity of getting it renewed (*a*).

Erle, for the plaintiff.—Supposing all that has been stated in the opening to be proved, it would be no defence to the present action. By the note, which is a written instrument, the defendant is to pay the plaintiff £30 at the end of a month, and this written contract is sought to be varied by a parol bargain, which cannot be allowed. This point was decided in the case of *Hoare* v. *Graham* (*b*).

Carrington.—If the facts which are stated in the 3rd plea do not amount to a defence, the plaintiff should have demurred.

Lord ABINGER, C. B.—I must try the case on the 3rd plea. The plaintiff has taken issue upon it, and it comes before me as a specific issue of fact, whether that which is stated in that plea is, in point of fact, true or not.

To prove the bargain for the loan of money, Mr. Eicke was called. He stated that, being a friend of the defendant and of Mr. Whitmarsh, he, by the desire of the defendant, went to Mr. Whitmarsh to ask if he would advance money.

Erle.—I submit that we must not hear what Mr. Whitmarsh said. That is no evidence against the plaintiff.

Carrington.—The first allegation in the plea is, that the defendant made a bargain with Mr. Whitmarsh, which

(*a*) The second plea was abandoned, in consequence of the decision of the case of *Holt* v. *Miers*, 5 Mee. & W. 168.

(*b*) 3 Camp. 57. In that case it was held, that in an action on a bill of exchange or promissory note, the defendant cannot give in evidence a parol agreement, entered into when it was drawn, that it should be renewed, and payment should not be demanded when it became due.

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is denied by the replication, and I am now going to prove it.

Lord ABINGER, C. B., (to the witness).—Did you make the bargain, or did the defendant make it himself?

The witness.—I made the bargain.

Lord ABINGER, C. B.—The actual making of the bargain with Whitmarsh is evidence, but not anything that Whitmarsh said afterwards.

The witness stated, that Mr. Whitmarsh agreed to advance to the extent of £200, for either twelve or eighteen months, on bills at a month, renewable on payment of a shilling in the pound per month.

Carrington.—Does your Lordship think that I cannot ask what Mr. Whitmarsh said afterwards on this subject?

Lord ABINGER, C. B.—I think it is not evidence against the plaintiff.

The question was not put.

To shew that the plaintiff was a trustee for Mr. Whitmarsh, a paper in his handwriting, in which interest at the rate of £60 per cent. on two other notes, payable at a month, and stated to be drawn in the plaintiff's favour, one for £30, dated the 26th of August, and the other for £20, dated the 4th of September, was put in. This paper also contained an item of "charges 1*l*. 1*s*." It was also proved that the plaintiff had said to the defendant's son that it was very wrong of the defendant to say that he (the plaintiff) charged interest at the rate of £60 per cent., for that he had never received a shilling of it.

A letter from the plaintiff to the defendant was put in, dated August 30th, 1838; and it was proposed by the de-

fendant's counsel to give in evidence the contents of the defendant's answer to it, dated September 1st, 1838, which was called for under a notice to produce.

Erle, for the plaintiff, objected that the notice to produce it had been served too late.

It was proved that the notice to produce was left at the office of the plaintiff's attorney at a quarter before nine on the evening before the trial. The witness stated that he was sure it was before nine o'clock, because, after serving the notice, he had arrived at home before the clocks struck nine; and he also stated that the plaintiff's attornies had left their office, and he was told by the housekeeper that if he placed the notice on the table in the office, they would be sure to have it the first thing in the morning.

Lord ABINGER, C. B.—In reality this is only notice to the attornies on the morning of the trial.

Carrington.—I submit that a letter from the opposite party is a document that must be presumed to be in the hands of the attornies, and that, as by the rules of the Court service before nine o'clock in the evening is good service, it is their own fault if they leave their office before that time.

Lord ABINGER, C. B.—I think it is too late. There is no reason why the notice could not have been served earlier; persons should not be so tardy in serving notices.

With a view of further proving the bargain between Mr. Whitmarsh and the defendant, and also to prove the renewal of the different promissory notes, it was proposed to put in the Nisi Prius record and postea in the former action of *Holt* v. *Miers*. In that action the defendant had,

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in his plea, which was a plea of usury, stated the bargain between Mr. Whitmarsh and himself, and also the renewal of the different bills, and that the plaintiff was the attorney and trustee for Mr. Whitmarsh, as they were stated in the present plea, and the plaintiff, in his replication, had merely denied that he was attorney and trustee. The verdict was for the defendant, but there had been no judgment. It was also proposed to put in the issue delivered in that case by the present plaintiff, who then sued in person.

Erle.—I submit that neither of these is evidence. As there is no judgment, the Nisi Prius record is not evidence, even between the same parties; and the undenied statements of a plea are not evidence against the party, even to prove another issue in the same cause. Admissions in pleading are now no more than admissions for the purposes of that particular cause.

Carrington.—These are admissions between both the same parties; and as, in the former case, the plaintiff sued in person, the issue is, I submit, the same as any other paper in which he sets forth several statements of the opposite party, and denies only one of them.

Lord ABINGER, C. B.—If there had been a judgment between the same parties touching the same matter, I am not prepared to say that I should have rejected the evidence. Here it appears that the only question in the former cause was, whether the plaintiff was a trustee, and on that point it is conceded that this record is not receivable because there is no judgment. I think I ought to reject the evidence.

The evidence was rejected.

Erle.—There is no evidence of the original bargain as stated in the plea, nor of the renewal of the notes. Neither

is there any evidence of a refusal by Mr. Whitmarsh to renew.

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Lord ABINGER, C. B., was of opinion that the 3rd plea was not proved, and directed a verdict for the plaintiff.

Verdict for the plaintiff.

Erle and *Wordsworth*, for the plaintiff.

Carrington, for the defendant.

[Attornies—*Jennings & C.*, and *J. B. Taylor*.]

In the ensuing term *Carrington* applied for a new trial, but the Court refused a rule.

CRONK *v.* FRITH.

Nov. 28th.

If, since the execution of a deed, the subscribing witness to it has become blind, a party suing on the deed must, if non est factum be pleaded, call the subscribing witness, and it is not enough to prove the handwriting of the parties executing the deed and of the subscribing witness.

DEBT on a bond.—Pleas, 1st, non est factum; 2nd, that the defendant was persuaded to execute the bond while he was drunk, and that he did so; 3rd, fraud.

Replication, denying the second and third pleas.

It was opened by *Jervis* for the plaintiff, that, since the execution of the bond, Mr. Crundwell, the subscribing witness to it, had become blind, and he therefore proposed to prove the execution of the bond in the same way as if the witness were dead.

Evidence was given that the signature to the bond was of the defendant's handwriting, and that the signature to the attestation was of the handwriting of Mr. Crundwell; and it was also proved that since the date of the bond Mr. Crundwell had become blind; but the witness who

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proved these facts stated, in answer to a question put by *Humfrey* for the defendant, that Mr. Crundwell was in Court.

Humfrey, for the defendant.—I submit that the bond cannot be read without calling the subscribing witness. It is said that he is blind; but one great object in having the subscribing witness called is to hear his evidence as to the circumstances attendant on the making of the instrument; and he may remember those circumstances though he cannot see, and his evidence may be of the greatest importance on a plea like the second.

Jervis and *Erskine Perry*, for the plaintiff, cited *Wood* v. *Drury* (*a*), *Pedler* v. *Paige* (*b*), Starkie's Law of Evidence (*c*), and Roscoe's Law of Evidence (*d*).

Lord ABINGER, C. B.—I am decidedly of opinion that the bond cannot be read without calling the subscribing witness. He might from his recollection of the transaction give most important evidence respecting it.

(*a*) 1 Ld. Raym. 734. The report of that case is as follows:—"At the Summer Assizes of Warwick, 1699, a deed was produced to which there were two witnesses, one of whom was blind. It was ruled by *Holt*, C. J., that such deed might be proved by the other witness and read, or might be proved without proving that this blind witness is dead, or without having him at the trial, proving only his hand; and so it was done in this case."

(*b*) 1 M. & Rob. 258. This was an action of debt on bond, with pleas of non est factum, and a release by a lost deed: for the defendant it was proposed to put in an instrument attested by a witness, who was proved to be blind, on proving his handwriting. The evidence was objected to on the ground that the witness might recollect the facts of this transaction; and in support of its reception the case of *Wood* v. *Drury*, and the works of Mr. Starkie and Mr. Roscoe on the Law of Evidence, were cited. Mr. Justice *Park* said, "There is great weight in the reasons urged for calling the witness, but under the authority of the case cited I shall receive the evidence;" and his Lordship received the evidence.

(*c*) Vol. 1, p. 325.

(*d*) 5th Ed. p. 88.

Jervis called the subscribing witness.

Verdict for the plaintiff.

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Jervis and *Erskine Perry*, for the plaintiff.

Humfrey, for the defendant.

[Attornies—*Lucas & P.*, and *Shuter*.]

Sittings in London after Michaelmas Term, 1839.

BEFORE MR. BARON ALDERSON.

BETTS *v.* JONES and Others.

Dec. 9th.

DEBT for goods sold. Plea, nunquam indebitatus.

It appeared that the defendants were three of the directors of the Kent Zoological and Botanical Institution; and the present action was brought by the plaintiff, who was a butcher at Gravesend, to recover the price of meat supplied by him for the animals in the society's gardens at Rosherville.

The defence was, that the plaintiff was a shareholder in the institution, and, to prove this, another shareholder was called.

It appeared that the witness had been released by one of the defendants only.

Crowder, for the plaintiff, objected that the witness was not competent, as either of the two defendants, who had

A butcher sued three of the directors of a Zoological Society for goods supplied for the animals. For the defence a witness was called to prove that the plaintiff was a shareholder in the society. The witness was himself a shareholder, and had been released by one of the defendants:—*Held*, that the witness was not competent without being released by all the three defendants, but that he would be so, if released by all three defendants, without being released by the other shareholders.

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not released him, might sue him for contribution in case the plaintiff succeeded against them in this action. He further submitted, that to make the witness competent he should be released by all the other shareholders, as any of them might sue him hereafter for contribution.

ALDERSON, B.—I think that the witness is not competent unless all the three defendants release him; but if he be released by each of the defendants, he would be a competent witness without being released by all the other shareholders.

The witness was not examined.

The case was compromised.

Crowder and *Ogle*, for the plaintiff.

Sir *F. Pollock* and *E. J. James*, for the defendant.

[Attornies—*Fenton* and *Taylor*.]

KERRIDGE *v.* HESSE.

Where a local committee is formed for the purpose of forwarding the project of an intended railway, they are the persons who are liable to pay the salaries of their secretary, &c., unless it be shewn that the secretary, &c., agreed to look to some other fund for payment.

And where the defendant was not a member of the local committee at the time the plaintiff was first engaged as secretary, but became so while the plaintiff continued secretary, it will be for the jury to say whether the defendant did not continue to employ the plaintiff on the same terms in which he was originally engaged.

ASSUMPSIT for work and labour. Plea, non assumpsit. It appeared that a railway was proposed to be constructed from Nottingham to London, to be called the Midland Grand Junction Railway, and that the plaintiff was, on the 3rd of June, 1838, appointed secretary to the local committee, who were engaged in trying to form a com-

pany, the defendant becoming one of that committee in October, 1838, and while the plaintiff's services continued. The company was never formed, and the projected railway was given up.

The defence was, that the plaintiff was only to be paid from the funds of the company when formed; but that it had been agreed between him and the committee, that the committee were not to be personally liable.

With a view of shewing this, *Hill*, for the defendant, proposed to call Mr. Wardell, a member of the committee.

Jervis, for the plaintiff.—I submit that he is not a competent witness.

ALDERSON, B.—As he is a member of their committee he is not a competent witness, unless you release him.

The witness was not examined.

For the defendant, the minute-book of the committee was put in, containing a resolution of the committee, dated on the 3rd of June, 1838, in the plaintiff's handwriting, by which it was resolved that the whole of the resolutions of the committee were to be without personal liability, and that all remunerations were to be paid from deposits or instalments.

ALDERSON, B., (in summing up).—It appears that a company was proposed for a railway from Nottingham to London, and that a committee was formed for the purpose of forwarding the project. The members of this committee would be the persons liable to pay the salaries of those who were employed like the plaintiff, unless the plaintiff contracted only to be paid from some particular fund, and not to look to the committee for payment for his services. It seems to be made out that the defendant

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was a member of the committee from October, 1838. He was not so when the plaintiff first became secretary; but if he continued to employ the plaintiff as secretary, it will be for you to say, whether he did not continue to employ him on the terms upon which he was originally appointed. Still the real question in this cause is, whether the plaintiff agreed that he was not to look for payment from the members of the committee individually, but was only to be paid from the deposits and instalments, in case the company was formed.

Verdict for the defendant.

Jervis and *Crompton* for the plaintiff.

Hill and —— for the defendant.

[Attornies—*C. Chester* and *J. Robinson*.]

PONTIFEX and Others *v.* JOLLY.

In an action on a bill of exchange by indorsee against acceptor, the defendant pleaded pleas denying the acceptance and the indorsement, and also two pleas of payment, upon all which issue was joined. The defendant's counsel, at the trial, offered to admit the acceptance and indorsement, and wished to begin:—*Held*, that this admission of all the facts, the proof of which was on the plaintiff, did not entitle the defendant to begin.

ASSUMPSIT on a bill of exchange, dated the 16th of February, 1839, drawn by James Jolly on the defendant for £25, payable three months after date, and by James Jolly indorsed to the plaintiff. Pleas, 1st, a denial of the acceptance; 2nd, a denial of the indorsement; 3rd, payment before the bringing of the action; 4th, that the bill was given as a security for the payment of a sum of 26*l.* 5*s.* due from James Jolly to the plaintiffs, and that that sum had been paid to the plaintiffs before the bringing of the action. Replication, to the 3rd and 4th pleas, de injuriâ.

R. V. Richards, for the defendant.—I will admit the

acceptance and the indorsement, and open my case on the 3rd and 4th pleas.

Kelly, for the plaintiffs.—The defendant admitting that the plaintiffs must have a verdict on the first two issues does not deprive me of my right to begin.

R. V. Richards.—I submit that this is like the case of an ejectment by heir against devisee; where, if the defendant admits the heir's primâ facie title, he is entitled to begin.

ALDERSON, B.—I think Mr. Richards now admitting the acceptance and indorsement will not entitle him to begin. On this record the plaintiff is entitled to begin.

Kelly, for the plaintiffs, opened his case.

Verdict for the plaintiffs.

Kelly and *Bayley* for the plaintiffs.

R. V. Richards and *Arnold* for the defendant.

[Attornies—*Pontifex & M.*, and *Mayhew & Co.*]

In the ensuing Term *R. V. Richards* applied for a new trial, on the ground that the verdict was against evidence; but the Court refused a rule.

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Dec. 13*th*.

BROWN *v.* NAIRNE.

Semble, that the broker's commission on the freight of a ship is five per cent., unless there be a special agreement or the ship be chartered upon a tender.

ASSUMPSIT for work and labour as an agent and broker, for money paid, and on an account stated. Plea, as to all but 70*l*. 10*s*. 1*d*., non assumpsit; and as to that sum, payment of it into Court (*a*). Replication, joining issue on the plea of non assumpsit, and accepting the 70*l*. 10*s*. 1*d*. in satisfaction of so much of the plaintiff's demand.

This was an action brought by the plaintiff to recover commission as a broker for obtaining a charter for the Anna Robertson, from London to South Australia and back, at a sum of £2000.; the real question in the case being, what amount per cent. a broker is entitled to receive on a chartered ship when there is no special agreement.

On the part of the plaintiff it was contended that the rate of brokerage on all ships was £5 per cent. unless there was a special agreement, or unless the ship was chartered upon a tender; and fourteen witnesses were examined in support of this amount.

For the defendant it was contended, that if there was no special agreement the brokerage on a general ship was £5 per cent., and 2½ per cent. on a chartered ship, and eight witnesses were examined in support of this scale of charge, who stated that the trouble with a chartered ship was much less than with a general ship; but these witnesses had, several of them, paid the 2½ per cent. only upon ships chartered for troops, emigrants, and convicts.

ALDERSON, B., (in summing up).—The question is, what is the proper remuneration for a broker for obtaining a charter for freight amounting to £2000? The amount at 2½ per cent. has been paid into Court; but it is contended

(*a*) A sum of 70*l*. 10*s*. 1*d*. was paid into Court, but only £50 of it was applicable to the matter really in dispute, the remaining 20*l*. 10*s*. 1*d*. applying to disbursements made by the plaintiff for the defendant, on which no question arose.

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on the part of the plaintiff, that the brokerage should be calculated at £5 per cent., which would be £50 more, and the plaintiff has called several witnesses who speak to having been uniformly paid at that rate on chartered ships. For the defendant, witnesses are called to give another view of the case; but you will consider whether they are ad idem, or whether they speak of particular transactions only. It is much to be desired that there should be a general definite rule, well known and well understood, which should govern every case unless there was a special agreement. The rule contended for by one party would be just as definite as the rule contended for by the other, and either might be varied to suit a particular case. I do not think that the amount of the trouble in each case is to be a criterion, because, if it were, the payment would not be by a per-centage, which is what both parties contend for, though they differ as to its amount. If you are satisfied that in point of fact it is the practice for brokers to be paid £5 per cent. on such a charter as this, you will find for the plaintiff for £50 more than has been paid into Court. If you think that the practice is to pay 2½ per cent. on all charters, you will find for the defendant. If you think that there is no practice on the subject, you will find what is the amount that you think a reasonable remuneration to the broker in this case for his services; and if that amount exceeds 2½ per cent., you will find for the plaintiff for the excess.

Verdict for the plaintiff—Damages £50 (*a*).

(*a*) From the case of *Read* v. *Rann*, 10 B. & C. 438, it appears, that a shipbroker, who has procured a bargain for the hire of a vessel, is, by the usage in the city of London, entitled to receive from the owner a certain commission on the amount of freight, if the contract is perfected, but not otherwise; and it was held, that where a broker had negotiated the hire of a vessel, and a memorandum for a charter was signed by the parties, but the bargain afterwards went off, and the ship was not employed, the broker could not maintain an action against the shipowner to recover the commission, or a compensation for his work and labour.

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C. Cresswell and *Wollaston* for the plaintiff.

Thesiger and *Whateley*, for the defendant.

[Attornies—*Desborough & Young*, and *Mitchell & Hill*.]

Sittings at Westminster after Easter Term, 1840.

BEFORE MR. BARON ROLFE.

HARNETT *v.* JOHNSON.

In assumpsit for wrongfully dismissing a teacher in a school before the expiration of the year for which he was engaged, the defendant pleaded only a special plea justifying the dismissal, upon which issue was taken:—*Held*, that on this issue the defendant was entitled to begin.

ASSUMPSIT for having discharged the plaintiff, an assistant teacher in a school, before the expiration of the year for which he had been engaged. Second count upon an account stated. Pleas, as to all but the first count, non assumpsit, and as to the first count a justification of the discharge. Replication, taking issue on the special plea.

Stammers, for the defendant, submitted that on these pleadings the defendant was entitled to begin.

ROLFE, B.—Is there not an issue joined on the account stated?

Stammers.—There is; but that makes no difference unless the plaintiff's counsel will undertake to give evidence on that count. That was held in the case of *Smart* v. *Rayner* (*a*), and that case has been acted on ever since.

Platt, for the plaintiff.—Before the case of *Cooper* v. *Wakley* (*b*), and indeed in that case, it was held that where

(*a*) Ante, Vol. 6, p. 721. (*b*) Ante, Vol. 3, p. 474.

there was an affirmative justification without any general issue, the defendant had a right to begin. That rule was altered at a conference of all the Judges, and in case the amount of damages is to be proved, I submit that the plaintiff should begin.

Stammers.—The rule which was laid down by the Judges after the case of *Cooper* v. *Wakley*, was, that in future, in all cases of libel, slander, and personal injuries, the plaintiff should begin, although the general issue was not pleaded, but only an affirmative justification. That rule, however, does not apply to an action upon a contract like the present, nor does it make any difference that the damages are in some degree unliquidated. That appears from the case of *Reeve* v. *Underhill* (*a*), and other authorities. Besides, the defendant here will admit that if the plaintiff is entitled to any damages, he is entitled to the amount claimed in the particular (*b*).

ROLFE, B.—The defendant must begin.

The defendant's counsel began.

Verdict for the plaintiff.

Platt and *Bayley*, for the plaintiff.

Erle and *Stammers*, for the defendant.

[Attornies—*Barton* and *Edward Smith*.]

(*a*) Ante, Vol. 6, p. 773. See the case of *Aston* v. *Perkes*, post, p. 231.

(*b*) It seems that an admission of this sort made at the trial, will not alter the right to begin. See the case of *Pontifex* v. *Jolly*, ante, p. 202.

1840.

Second Sitting at Westminster in Trinity Term, 1840.

BEFORE MR. BARON PARKE.

BINNS v. PIGOT.

An innkeeper has no lien on a horse placed in his stable for the amount of its keep unless it be placed there by a guest.

If a person is stopped with a horse under suspicious circumstances, and the horse be placed at an inn by the police, the innkeeper has no lien on the horse for its keep; and if an auctioneer, by the direction of the innkeeper, sell the horse for its keep, he is liable to be sued in trover by the owner of the horse.

TROVER for a horse.—Pleas, 1st, not guilty; 2nd, that the plaintiff was not possessed of the horse as of his own property; 3rd, that a person named Furze was an innkeeper and livery-stable-keeper, and that the horse was placed with him at livery by a person named Miller, the apparent owner thereof, upon the terms that it was to be sold if the keep was not paid for; and that the keep not being paid for by Miller, the defendant, as an auctioneer, sold the horse by the direction of Furze, who had no notice that the horse belonged to the plaintiff. Replication to the 3rd plea, de injuriâ.

It was opened by *Platt*, for the plaintiff, that on the 10th of June, 1839, the plaintiff, who lived in London, had given the horse into the charge of a bricklayer in his employ to take to Elvetham, in Hampshire, where the plaintiff also had a house; but although the bricklayer had started from London at seven o'clock in the evening, he was stopped with the horse by the police at Richmond at almost one o'clock the next morning, he being taken into custody, and the horse placed at Mr. Furze's inn. In the month of July the horse was sold by the defendant for the keep. He submitted that the innkeeper could have no lien for the keep of the horse, as it was placed in his hands against the will of the owner.

It was proved that the horse was stopped by the police, as before stated; and that on the 25th of July, 1839, Mr. Thorn, a friend of the plaintiff, went to the defendant and

Mr. Furze, and told them that he came by the authority of the plaintiff to forbid the sale, and that Mr. Furze asked Mr. Thorn if he would pay for the keep of the horse, which he refused to do; and that Furze then directed the defendant to sell the horse, which he did.

PARKE, B.—The plaintiff is in this case entitled to a verdict, as the innkeeper had no lien upon the horse. How the horse got into the innkeeper's hands does not very distinctly appear. It was probably taken to him by the police. It is proved that the friend of the plaintiff refused to pay for the keep of the horse, but the plaintiff was not bound in point of law to pay for the keep, as the horse was not brought to the inn by a guest; and an innkeeper has no lien upon an animal put into his stable unless it be brought by a guest.

Verdict for the plaintiff.

Platt and *G. T. White*, for the plaintiff.

Thesiger and *Montagu Chambers*, for the defendant.

[Attornies—*Binns* and *W. Smith*.]

BUCKET *v.* CHURCH.

DEBT for money lent, for interest, and on an account stated. Pleas, nunquam indebitatus, and the Statute of Limitations.

The acknowledgment in writing to take a case out of the Statute of Limitations must either amount to a distinct promise to pay, or to a distinct acknowledgment that the sum is due.

It was opened by *Thesiger*, for the plaintiff, that the plaintiff was a person of advanced age and very penurious habits, who had for many years worked in market gardens,

Semble, that there is some doubt whether it is a question for the Judge or for the jury to determine, whether a letter written by the defendant be or be not a sufficient acknowledgment for this purpose; and till that point is settled, the learned Judge will, to save the parties expense, express his own opinion with respect to the document, and also leave it to the jury.

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but had amassed a property, of which she had placed £650 in the funds, and had lent £120 to the defendant, who had married her niece, the defendant having also prevailed on her to transfer her stock into the joint names of herself, the defendant, and his wife.

It was proved, that, in the year 1832, the plaintiff had placed £100 and afterwards £20 more in the hands of the defendant, who had been very kind to the plaintiff for some years, and had sent her Sunday dinners, cakes, tarts, &c., and that when she asked him for the money, which she repeatedly did, he on some occasions said she should have it, and on others that she should not.

To take the case out of the Statute of Limitations, a letter, written by the plaintiff's attorney to the defendant, and the defendant's answer, were relied on.

The letter of the plaintiff's attorney was as follows:—

"23rd November, 1838.

"Sir,—A Mrs. Susannah Bucket has instructed me to take proceedings against you to compel the payment of £120 she has placed in your hands, and a retransfer of £650 3½ per Cent. Stock she has placed in your name and your wife's jointly with her own. As she is a very old lady, I do not like to take any steps in the matter without giving you an opportunity of stating whether the charges she makes against you are correct, especially as she wishes me to prepare a will in which your wife and yourself are to have no interest. Unless, however, I hear from you on the matter, I shall treat her statement that you have forcibly deprived her of this money as true, which I cannot believe to be the case. She says you have not even paid her the interest on the £100; is this true?

"I am, Sir, yours obediently,

"To Mr. Levi Church. H. F. PHILIPPS."

The letter of the defendant in answer was as follows:—

"Brentford, 25th November, 1838.

"Dr. Sir,—I received your letter, and I can assure you

that every thing was done in an upright and fair manner, and before witnesses; it was Mrs. Bucket's own proposing and particular wish, so that when she died it should be no trouble nor expense. The £650 she has been receiving dividend for. The £100 she has been receiving double and treble for, believe me, Sir, and if you will refer to Mr. Peake, broker, he will tell you the same; the transferring was done by Mr. Peake, and I have a bill and receipt for the same; and I fully expect to be in London in a few days at Mr. Branston's, and I will call on you.

"I am, Sir, your most obedient,

"H. Philipps, Esq. L. CHURCH."

Crowder, for the defendant.—I submit that the letter of the defendant does not take the case out of the Statute of Limitations. I apprehend that that is a question for the Judge and not for the jury. It was so considered in the case of *Morrell* v. *Frith* (*a*).

PARKE, B.—From the case of *Lloyd* v. *Maund* (*b*), it would appear to be a question for the jury. What I have always done is, to express my own opinion, and also take the opinion of the jury. If the two agree, it is well—if they differ, it will be for the Court to decide.

Crowder addressed the jury for the defendant, and contended that this was a gift and not a loan, and that the letter of the defendant did not take the case out of the Statute of Limitations, as the real meaning of the expression, "The £100 she has been receiving double and treble for" was, that she had received more than an equivalent twice or thrice over, in what the defendant and his wife had done for her.

PARKE, B., (in summing up).—The first question is, whether this £100 was a loan or a gift. That it was put into the hands of the defendant as one or the other is con-

(*a*) 3 M. & W. 402. (*b*) 2 T. R. 760.

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ceded. Mr. Philipps, in his letter, says that it was a loan, and the defendant does not, by his answer, deny that it was so. We now come to the Statute of Limitations—and, to take the case out of the operation of the statute, the party must either make a distinct promise to pay or else make a distinct acknowledgment that the sum is due; and I think, on the true construction of the defendant's letter, he admits the loan, and says, that so far from not having paid the interest, he asserts that he has paid double and treble interest. As there is some little difficulty whether it is a question for the Judge or a question for the jury, I shall leave it to you to say whether the defendant, by his letter, meant to say that the plaintiff had received double and treble the £100, or had received double and treble the interest only. The expression is not that she has "received double and treble," but has "received double and treble *for*." The Sunday dinners and cakes would very likely double and treble the interest, but would not double and treble the capital. I think there is no evidence to take the case out of the Statute of Limitations beyond £100. You will say also whether you will allow the defendant to deduct the interest up to the date of his letter, as he, in effect, asserts that it has been satisfied up to that time. Still you may, if you think proper, disbelieve one part of his statement and believe another, or it may be that he may only mean that, having had the various articles that have been mentioned, the plaintiff ought not to charge interest.

Verdict for the plaintiff—the foreman of the jury saying, "We find for the plaintiff for £100, and interest since the date of the defendant's letter."

Thesiger and *Montagu Chambers*, for the plaintiff.

Crowder and *Fish*, for the defendant.

[Attornies—*H. Philipps* and *Hine*.]

OXFORD SUMMER CIRCUIT, 1839.

BEFORE MR. BARON ALDERSON AND MR. JUSTICE WILLIAMS.

WORCESTER ASSIZES.

(Crown Side.)

BEFORE MR. BARON ALDERSON.

REGINA *v.* THOMAS MARTIN (*a*).

1839.
July 16*th*.

Attempting to carnally know and abuse a girl between the ages of ten and twelve, is not an assault, if the girl consents to all that is done, but is a misdemeanour.

The person making such an attempt with the consent of the girl is not indictable for an assault, but is indictable for the misdemeanour of attempting to commit the misdemeanour of carnally knowing and abusing her.

MISDEMEANOUR.—The 1st count of the indictment charged the prisoner with having carnally known and abused Esther Ricketts, a girl above ten and under twelve years of age.

The 2nd count was for an assault on Esther Ricketts, with intent carnally to know and abuse her.

3rd count for a common assault.

It was proved by the prosecutrix, who was between ten and eleven years old, that the prisoner had laid her down in a field and had applied his private parts to hers, and hurt her much. Emission was proved, but there was no proof of penetration. From the cross-examination of the prosecutrix, it appeared that the prisoner had been with her in this way by her own consent, five times before, and that little boys had likewise done something of this kind, also by her own consent.

ALDERSON, B.—The first count is not proved.

(*a*) This case and that of *Rex* v. *Yarkhill* were omitted in their proper order of date, as the decisions in both were postponed.

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REGINA v. MARTIN.

Godson, for the prisoner.—I submit that if the fact occurred by the consent of the prosecutrix there can be no conviction either on the 2nd or the 3rd count.

ALDERSON, B.—The difficulty as to that is, whether she can properly be said to consent to that which is a misdemeanour by statute.

Godson cited the cases of *Regina* v. *Banks* (*a*), and *Regina* v. *Meredith* (*b*).

ALDERSON, B.—I will take the opinion of the jury as to whether that which was done, was, in fact, by the consent of the prosecutrix, and if they find that it was so, I will reserve the case for the consideration of the fifteen Judges. If the indictment had charged the prisoner with having attempted to commit the statutable misdemeanour, I am of opinion that the prisoner would have been liable to conviction; but as it is here charged as an assault, there may be some doubt upon it.

The jury found that the prosecutrix consented to all that the prisoner did.

ALDERSON, B.—I shall direct a verdict of Guilty to be entered on the 2nd and 3rd counts, on the ground that the prosecutrix was by law incapable of consenting to that which an act of Parliament has made a misdemeanour, and I shall reserve the point.

Verdict accordingly.

Beadon, for the prosecution.

Godson, for the prisoner.

[Attornies—*Cameron & Foley*, and *Wilson*.]

(*a*) Ante, Vol. 8, p. 574. (*b*) Ante, Vol. 8, p. 589.

1840.
March 5th.
REGINA
v.
MARTIN.

In Hilary Term, 1840, the case was considered by the Judges; and at the Spring Assizes of 1840, *Patteson*, J., delivered the judgment of the fifteen Judges:—"Thomas Martin, at the last assizes for this county you were found guilty of an assault upon a child between ten and twelve years old. The learned Baron before whom you were tried did not pass any sentence on you, but reserved the point for the consideration of the Judges, whether it was proper that you should have been convicted of an assault. The case has since been considered by the Judges, and inasmuch as it appeared that the child consented, the Judges are of opinion that the charge was not properly laid, and that as the child consented it was not an assault. The Judges have directed that no judgment is to be pronounced against you upon the indictment upon which you have already been tried. You are still liable to be indicted for the attempt to commit a misdemeanour, and will be so indicted at these assizes, although your offence is not an assault."

BEFORE MR. JUSTICE PATTESON.

1840.
March 7th.

REGINA *v.* MARTIN.

An indictment in the first count charged the defendant with having assaulted "E. R., an infant above the age of ten years and under the age of twelve years," with intent to carnally know and abuse her, and in the second count charged that the defendant "unlawfully did put and place the private parts of him the said T. M. against the private parts of her *the said E. R.*, and did thereby then and there unlawfully attempt and endeavour to carnally know and abuse *the said E. R.*"

MISDEMEANOUR.—The defendant, who was the defendant in the last case, was again indicted. The 1st count of the indictment charged him with having *assaulted* "Esther Ricketts, an infant above the age of ten and under the age of twelve years," with intent to carnally know and abuse her. The 2nd count was as follows:—"And the jurors aforesaid, upon their oaths aforesaid, do further present that the said Thomas Martin, afterwards, to wit, on the day and year aforesaid, at the parish afore-

Held, that the second count was bad, as it did not allege that E. R. was between the ages of ten and twelve:—*Held*, also, that the words "*the said E. R.*," merely meant that she was the same person as was mentioned in the first count, but that those words did not import unto the second count the description of E. R. with respect to her age.

Every attempt (not every intention, but every attempt) to commit a misdemeanour is a misdemeanour.

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said, in the county aforesaid, unlawfully did put and place the private parts of him the said Thomas Martin against the private parts of her *the said* Esther Ricketts, and did thereby then and there unlawfully attempt and endeavour to carnally know and abuse *the said* Esther Ricketts, against the peace of our Lady the Queen, her crown and dignity."

Godson, for the defendant.—This is the same case that was tried at the last assizes, and as the former prosecution failed because there was no assault, the 1st count is out of the question; and, with respect to the 2nd count, I submit that it is bad. The offence intended to be charged by the 2nd count was an attempt to have carnal knowledge of a child between ten and twelve years old, but it is not so charged—in that count Esther Ricketts is not charged to be between ten and twelve years old. All that is charged in that count is an attempt to commit fornication. It is true that the 2nd count refers to Esther Ricketts as "*the said* Esther Ricketts," but that merely means that she is the same person. The word "said" does not incorporate into the second count the description of between ten and twelve. In pleading, a character is frequently given to a person in a first count, and in a general count the person is again referred to as the said A. B., but that does not reassert his particular character, nor compel the prosecutor to give proof of it. If a first count charged that the defendant assaulted A. B., a constable, in the execution of his duty, and the second count was for an assault on *the said* A. B., it is quite clear that to warrant a conviction on the second count, it would not be necessary to prove that A. B. was a constable, and it therefore follows, that the expression "the said A. B." does not import the character and description of constable into the second count.

PATTESON, J.—I did not intend that the first count should have been inserted in this indictment.

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Beadon, for the prosecution.—We cannot support the first count.

PATTESON, J.—The second count taken by itself is bad. The only question is, whether the word "said" will help it, and I think that it does not. The count ought to have gone on to aver that Esther Ricketts was between the ages of ten and twelve. The ground on which the Judges went in the former case was, that although a child between ten and twelve cannot by law consent to have connexion, so as to make that connexion no offence, yet where the essence of the offence charged is an assault, (and there can be in law no assault unless it be against consent); this attempt, though a criminal offence, is not an assault; and the indictment must be for an *attempt* to commit the felony, if the child is under ten years old, and for an *attempt* to commit a misdemeanour if the child is between the ages of ten and twelve; for it is perfectly clear that every attempt (not every intention, but every attempt) to commit a misdemeanour is a misdemeanour. There was a case at Liverpool similar to the present, and there Baron *Parke* ruled that it was no assault, and directed a new indictment; but that indictment by a mistake charged the assault, which was the very thing that he intended to have been omitted, and the party escaped. If the second count here had contained the words "the said Esther Ricketts, then and there being above the age of ten years and under the age of twelve years," it would have been sufficient. The indictment must be quashed.

Indictment quashed.

Beadon, for the prosecution.

Godson, for the defendant.

[Attornies—*Cameron & Foley*, and *Wilson*.]

1839.

HEREFORD ASSIZES.

(*Crown Side.*)

BEFORE MR. JUSTICE WILLIAMS.

REGINA *v.* THE INHABITANTS OF YARKHILL.

July 31*st.*

A prosecutor had obtained a summons under the 94th section of the Highway Act, 5 & 6 Will. 4, c. 50, calling on the parish surveyors to shew cause why a highway should not be repaired. The surveyors denied the liability of the parish to repair, and the magistrates (under the 95th section) ordered an indictment against the inhabitants of the parish, which was preferred, and was tried as a traverse on the Crown side of the assizes, and the defendants found guilty.

INDICTMENT for not repairing a highway. In this case the indictment had been preferred at a former assize, and came on to be tried as a traverse on the Crown side of these Assizes. It appeared that the prosecutor had obtained a summons under the 94th section of the Highway Act, 5 & 6 Will. 4, c. 50 (*a*), calling on the surveyors of the highways of the parish of Yarkhill to shew cause why the road should not be repaired. On the hearing of that summons before the magistrates, the surveyors, on behalf of the parish, denied the liability of the parish to repair, whereupon the magistrates, under the 95th section, ordered the present indictment to be preferred.

The jury found the defendants guilty.

Greaves, for the prosecution, applied for an order for the costs, and submitted that, under the 95th section of the act, the Judge had no discretion, but was obliged by that section to order the costs to be paid out of the highway rate of the parish.

Held, that the prosecutor was entitled to an order, under the 95th section, to have his costs paid out of the highway rate, and that the statute as to this was imperative, and left no discretion whatever in the Judge.

(*a*) The different sections of the stat. 5 & 6 Will. 4, c. 50, here referred to, will be found in Burn's Justice, Tit. "Highways."

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REGINA v. THE INHABITANTS OF YARKHILL.

WILLIAMS, J., said that he would consider of the point; and on the 22nd of February, 1840, (after conferring with the other learned Judges), his Lordship granted an order for the costs of the prosecution to be paid out of the highway rate, on the ground that the words of the statute were imperative, and left no discretion whatever in the Judge.

Greaves and *W. H. Cooke*, for the prosecution.

Whateley and *W. J. Alexander*, for the defendants.

[Attornies—*Lanwarne* and *Higgins*.]

See the case of *Reg.* v. *The Inhabitants of Chedworth*, post.

OXFORD SPRING CIRCUIT, 1840.

BEFORE MR. JUSTICE PATTESON AND MR. BARON GURNEY.

READING ASSIZES.

BEFORE MR. BARON GURNEY.

REGINA v. CROFTS. *Feb. 25th.*

In order to prove the identity of a prisoner who is named in a certificate of a previous conviction, it s not necessary to call a witness who was present at the trial to which the certificate relates, it is sufficient to prove that the prisoner is the person who underwent the sentence mentioned in the certificate.

HOUSEBREAKING.—The indictment, besides the ordinary count for housebreaking, charged that the prisoner had been previously convicted of felony at the Newbury Borough Sessions, holden on the 31st of October, 1 Vict.

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REGINA v. CROFTS.

The housebreaking was proved.

To prove the previous conviction, a certificate of Mr. Vines, the clerk of the peace of the borough of Newbury, was put in: it certified that at the Sessions of that borough, holden on the 31st of October, 1 Vict., the prisoner had been convicted of stealing cotton print, and had been sentenced to be imprisoned four months.

To prove the identity of the prisoner, Mr. Hackett, the governor of Reading gaol, was called: he said, "The prisoner was in my custody before the Newbury Borough Sessions in October, 1837; I sent him to Newbury at that time; I was not at the trial, but I received him back with an order from the Newbury Sessions; and he remained in my custody for four months under that sentence."

GURNEY, B.—That is sufficient (*a*).

Verdict—Guilty.—Sentence—Transportation for life.

Tyrwhitt, for the prosecution.

[Attorney—*Roberts*.]

(*a*) Precisely similar evidence was acted upon in several other cases in the course of the circuit.

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OXFORD ASSIZES.

BEFORE MR. BARON GURNEY.

RICHARDS *v.* FRANKUM.

DETINUE "for a certain promissory note in writing of great value, to wit, of the value of £50, made by Thomas Fox Hitchcock, payable to the said plaintiff." Pleas, 1st, non detinet; 2nd, that the plaintiff "was not lawfully possessed, as of his own property, of the said promissory note;" 3rd, that after the note was made, and before the commencement of the action, the plaintiff assigned the note to John Grainger, who delivered it to the defendant, and that the defendant as his servant and by his command detained it. Replication to the last plea, denying that the plaintiff had assigned the note to Grainger, and that Grainger had delivered it to the defendant in manner and form, &c.

It was proposed, on the part of the plaintiff, to put in two letters, written by the plaintiff's attorney, Mr. Dickenson, without putting in the defendant's answer to the first of them.

Ludlow, Serjt., for the defendant.—I must object to these letters being put in without the answers.

F. V. Lee, for the plaintiff.—The other letters may be

A letter written by a party is not admissible in evidence in his own favour, except as a notice or a demand.

On the trial of an action of detinue for a promissory note, the note was called for by the plaintiff's counsel, and produced by the defendant's counsel, and had on the back this memorandum:—"This draft was signed in my presence, on the date within named. (Signed) N. D.:"—*Held*, that the plaintiff must call N. D. to prove the making of the note:—*Held*, also, that if the plaintiff had the note read in evidence, he was, if required by the other side, bound to read an indorsement on the note as well as what was written on the face of it.

The note was indorsed by the plaintiff as follows:—"I hereby assign this draft, and all benefit of the money secured thereby, to J. G., of &c., and order the within-named T. F. H. [the maker of the note] to pay him the amount thereof, and all interest in respect thereof. (Signed) H. O. R.:"—*Held*, that this indorsement did not require a stamp.

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put in by the defendant as his evidence. In the case of *Lord Barrymore* v. *Taylor* (*a*) it was held, that it was not necessary to give in evidence the whole of the correspondence.

GURNEY, B.—In that case it was held, that the letters of the opposite party were receivable in evidence without putting in your own letters to which they were answers. What the defendant writes is evidence for the plaintiff; but the plaintiff cannot make evidence for himself by his attorney writing to the defendant. That can be done only for the purpose of shewing either notice or a demand.

The following letters were then put in; the first was from the plaintiff's attorney to the defendant.

"3, Lincoln's Inn New Square,
" 29th Aug., 1839.

" Sir,—I am instructed by Mr. Grainger, as well as Mr. Richards, for whom I am professionally concerned, to apply to you for the delivering up to me, as their attorney, *a £50 bill of exchange now in your hands*, belonging to Mr. Richards, which latter gentleman will sustain considerable loss by your withholding. If you have any professional claim, be good enough to send it to me, and, if correct, I will, on delivering up of the before alluded to bill, forthwith discharge it.

" Your obedient servant,

" To Mr. Frankum. E. A. DICKENSON."

(*a*) 1 Esp. N. P. C. 326.—In the case of *Sturge* v. *Buchanan*, 2 M. & Rob. 90, it was held, that where the plaintiff gave in evidence letters of the defendant, selected out of a correspondence, the defendant was not thereby entitled to put in letters of intermediate date, written by his agent to the plaintiff on the same subject-matter, unless the letters already in evidence refer to those proposed to be put in. See the cases of *Roe*, Bart., v. *Day*, ante, Vol. 7, p. 705: *Healey* v. *Thatcher*, ante, Vol. 8, p. 388.

The following answer, written by Mr. Frankum's managing clerk, was also read:—

"Abingdon, 31st August, 1839.

"Sir,—I am directed by Mr. Frankum to acknowledge the receipt of your letter, and to inform you that he conceives, under the circumstances, that he shall not be justified in delivering up *the document you refer to*, nor any papers belonging to those parties, without the authority of a Judge's order.

"I am, Sir, yours obediently,

"Mr. E. A. Dickenson. THOMAS J. WAGNER."

The following from the plaintiff's attorney to the defendant was also read:—

"3, Lincoln's Inn New Square,
"2nd Sept., 1839.

"*Richards* v. *Yourself*.

"Sir,—Having been duly authorized by Mr. Richards to apply to you for the delivering up to me of the £50 *promissory note*, and had the concurrence of Mr. Grainger for so doing, I had hoped that you would have restored the note without further trouble; but as you object to doing so, except by an unnecessary and expensive process, I have no remedy but to issue the present writ; and have to add, that every day's delay works an additional injury to the plaintiff, who is prevented getting out of custody owing to the want of this document.

"I am, Sir, yours obediently,

"To Mr. Frankum. E. A. DICKENSON."

To disprove the allegation in the 3rd plea, that the note was delivered by John Grainger to the defendant, John Grainger was called: he stated that he had not delivered the note to the defendant, and did not know him, but that he understood his (Grainger's) wife had taken the note somewhere; he also stated that he had agreed to buy some houses

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of the plaintiff, and had advanced £90 of the purchase-money, and that the plaintiff had deposited this note with him as a security, and that he was to hold it till he had the houses; he further stated that he had been let into possession of the houses, but had never had any rent, or any conveyance, or any title-deeds delivered to him.

The plaintiff was resting his case here.

GURNEY, B.—There is no evidence that the defendant ever had any promissory note for £50 payable to the plaintiff. You have demanded a bill of exchange in the only letter to which you put in the defendant's answer. In the second letter you demand a note, but you have given no evidence that the defendant ever had any note.

On the part of the plaintiff Mrs. Grainger was then called: she said that she went with the plaintiff to the defendant's office, and some papers were given to the defendant, and that the defendant said to her, "If you have the houses, the £50 note will belong to Richards; if not, it will belong to you."

F. V. Lee, for the plaintiff, called for the note.

It was produced by *Ludlow*, Serjt., who objected that it could not be read without calling the subscribing witness.

On the back of it was the following attestation:—

"This draft was signed in my presence, on the date within named. "NATHANIEL DODSON."

GURNEY, B.—You must call the subscribing witness.

The Rev. Nathaniel Dodson, the subscribing witness, proved the making of the note, which was read, and was a promissory note for £50, as described in the declaration.

Ludlow, Serjt., asked that the indorsement should be read.

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F. V. Lee.—I want the note itself only; if anything else is written on the back, I apprehend that I am not bound to give it in evidence.

GURNEY, B.—If you call for a note, and it is given to you, I am of opinion that if it is required by the other side, you are bound to read the indorsement if there be one, as well as that which is on the front of the note.

F. V. Lee.—I submit that the indorsement cannot be read without being stamped.

The indorsement was in the following form:—

"29th April, 1839.

"I hereby assign this draft, and all benefit of the money secured thereby, to John Grainger, of Bessilsleigh, in the county of Berks, labourer; and order the within-named Thomas Fox Hitchcock to pay him the amount thereof, and all interest in respect thereof.

"HENRY OWEN RICHARDS."

GURNEY, B.—What stamp do you say it requires?

F. V. Lee.—An agreement stamp.

GURNEY, B.—It is no agreement; it amounts to nothing more than an ordinary indorsement of the note, but it is in a very elaborate form.

Ludlow, Serjt., addressed the jury, and submitted that on the evidence it was manifest that the defendant was to hold this for Grainger till the plaintiff had conveyed him the houses, and that the defendant would not have been justified in delivering it up to the plaintiff, he holding the note as he did for the benefit of Grainger.

GURNEY, B., (in summing up).—I think that on the

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first issue, on the plea that the defendant does not detain the note, the verdict ought to be for the plaintiff, but I will give leave to move on that point. With respect to the second issue, on the property of the note, I am clearly of opinion that the verdict must be for the defendant. If you look at the indorsement only, the note, so far from being the plaintiff's, is absolutely assigned to Grainger; but even taking the parol evidence, the note is to be Grainger's till the purchase of the houses is completed; and upon that part of the case it is proved, that, although Grainger has been let into possession, he has had no conveyance, and received no rent, neither has he any title-deeds delivered to him. Therefore, even taking it in that view, the plaintiff is not entitled to recover the note. With respect to the third plea, you will have to say on the evidence, whether it is made out to your satisfaction that the plaintiff assigned the note to Grainger, which it is quite clear that he did, and that Grainger's wife, acting as his agent, and the plaintiff, deposited it with the defendant to keep for Grainger.

Verdict for the plaintiff on the first issue; and for the defendant on the second and third issues.

F. V. Lee and *Pyke* for the plaintiff.

Ludlow, Serjt., and *Carrington*, for the defendant.

[Attornies—*E. A. Dickenson* and *Frankum*.]

In the ensuing Term, *Ludlow*, Serjt., applied to the Court of Exchequer to enter a verdict for the defendant on the first issue, in pursuance of the leave given at the trial, but the Court refused a rule. On a subsequent day *Pyke* moved for a new trial, but the Court refused a rule.

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REGINA *v.* TULLY.

FALSE pretences. The first count of the indictment stated that the defendant on &c., at &c., "unlawfully did falsely pretend to one James Lovelock, that he, the said John Tully, was sent by William Perkins for an order to go to Bracey's (meaning Joseph Bracey, a shoe-factor) for a pair of high shoes. By means of which false pretence he, the said John Tully, did then and there unlawfully obtain of and from the said Joseph Bracey one pair of shoes, of the value of nine shillings, of the goods and chattels of the said Joseph Bracey, with intent then and there to cheat and defraud the said James Lovelock of the price and value of the said shoes, to wit, of the sum of nine shillings of the monies of the said James Lovelock." The count then went on to negative the false pretence, concluding against the form of the statute, &c.

Second count. That the defendant on &c., at &c., "unlawfully did falsely pretend to the James Lovelock, that William (meaning William Perkins) had said that the said James Lovelock was to give him (meaning the said John Tully) an order to go to Bracey's (meaning the said Joseph Bracey's) for a pair of high shoes. By means of which last-mentioned false pretence, he, the said John Tully, did then and there unlawfully obtain from the said Joseph Bracey, in the name of the said James Lovelock, one pair of shoes of the value of nine shillings, of the goods and chattels of Joseph Bracey, with intent then and there to cheat and defraud the said James Lovelock of the same." This count went on to negative the false pretence, and concluded against the statute, &c.

The defendant pleaded guilty.

GURNEY, B., (having read the indictment).—I am of

An indictment for false pretences charged, in the first count, that the defendant "unlawfully did falsely pretend to one J. R., that he, the said J. T., was sent by W. P. for an order to go to J. B. for a pair of shoes," by means of which false pretence he did obtain from J. B. a pair of shoes of the goods and chattels of J. B., with intent to defraud J. L. of the price of the said shoes, to wit, nine shillings, of the monies of J. L. The second count charged, that he falsely pretended to J. L., that W. P. had said tha J. L. was to give him, the said J. T., (the defendant), an order to go to J. B. for a pair of shoes, by means of which false pretence he did obtain from J. B., in the name of J. L., a pair of shoes of the goods of J. B., with intent to defraud J. L. of the same:—*Held*, that both these counts were bad, in arrest of judgment, as neither of them charged a sufficient false pretence within the stat. 7 & 8 Geo. 4, c. 29, s. 53.

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opinion, that neither of these counts charges any offence against the act of Parliament (*a*). The judgment must be arrested.

Judgment arrested.

Keating, for the prosecution.

[Attorney—*J. Cooke.*]

(*a*) The stat. 7 & 8 Geo. 4, c. 29, s. 53.

WORCESTER ASSIZES.

(Crown Side.)

BEFORE MR. JUSTICE PATTESON.

REGINA *v.* W. GUTTRIDGE, H. GUTTRIDGE, GOODWIN, and FELLOWS.

A true bill was found against several prisoners for a rape. The prisoners had been on bail, and the prosecutrix did not appear either before the Grand Jury, or to give evidence on the trial; and an application being made to the Judge to postpone the trial, founded on affidavit, stating, that, in the belief of the deponent, the prosecutrix was kept out of the way in consequence of money having been given to her by some of the prisoners, the Judge postponed the trial, and would not admit the prisoners to bail.

RAPE.—The prisoners Guttridge had been on bail. The bill being found by the Grand Jury,

Huddlestone, for the prosecution, applied to postpone the trial till the next assizes, upon an affidavit, which stated that the deponent had reason to believe that the person alleged to have been ravished had been induced to keep out of the way, in consideration of a sum of money which had been given to her by the prisoners Guttridge, who had been out on bail.

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F. V. Lee, for the prisoners Guttridge, proposed that the recognizances of their bail should be enlarged, and mentioned a case in which his Lordship had adopted a similar course at Stafford.

PATTESON, J.—I recollect the case; but I have since reason to believe that I acted incorrectly. In cases of this serious nature, where the Grand Jury have found the bill, I cannot allow the prisoners to be admitted to bail. There was a case of *Regina* v. *Chapman* (*a*), in which Lord *Abinger* would not allow bail to be given.

The prisoners were ordered to be detained in custody till the next assizes.

Huddlestone, for the prosecution.

F. V. Lee, for the prisoners Guttridge.

[Attornies—*Fellows* and *B. Shaw*.]

(*a*) Ante, Vol. 8, p. 558. In several of the cases in which learned Judges have admitted parties to bail, there was no bill found.

STAFFORD ASSIZES.

(*Civil Side.*)

BEFORE MR. JUSTICE PATTESON.

GRAINGER *v.* RAYBOULD and Another.

DEBT for work and labour.—Plea, as to all but £10, nunquam indebitatus, and, as to that sum, payment into Court.

Where a plaintiff sues on a quantum meruit for work and labour, the defendant may (without pleading a set-off) give in evidence, that he provided the plaintiff's men, who did the work, with their beer, as it may be that the plaintiff deserves to be paid the less, because his men had their beer provided for them by the defendant.

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GRAINGER v. RAYBOULD.

For the plaintiff, evidence was given that his workmen put up a boiler and a tub at the defendants' mine, and 4*s*. a-day was stated to be a fair price for each man so employed.

Talfourd, Serjt., for the defendant, proposed to shew that, during the time the men were at work, the defendants provided them with beer.

Carrington, for the plaintiff.—I submit that the evidence is not admissible, as no set-off is pleaded for beer supplied to the plaintiff.

Talfourd, Serjt.—I put it, that if a party provide the men's beer, he ought not to pay at so large a rate per day as if no beer was supplied by him.

PATTESON, J.—I think that the evidence is receivable. The plaintiff goes on a quantum meruit, and it may be that he will deserve to have less if the defendant supplied his men with beer, than if the plaintiff himself had supplied the beer.

The evidence was received.

Verdict for the plaintiff for the amount of his claim, after deducting the value of the beer supplied by the defendants.

Carrington and *F. V. Lee*, for the plaintiff.

Talfourd, Serjt., and *Whateley*, for the defendants.

[Attornies—*B. Shaw* and *Hinchcliffe*.]

1840.

Aston *v.* Perkes.

TRESPASS for taking the plaintiff's goods.—Plea—1st, as to taking certain of the articles, to wit, one cow, one pig, &c., that Margaret Aston was seised in fee of an undivided moiety of certain premises, and made her will, and thereby devised that moiety of the premises to the plaintiff, subject to an annuity of £18 to Mary Aston for her life, payable half-yearly; the first payment to be made at the expiration of six calendar months after her decease, with a power of distress. This plea then went on to aver that Margaret Aston died without altering her will, and that the sum of £63 for 3½ years of the annuity was in arrear, and that the defendant, as the bailiff of Mary Aston, took the goods as a distress for those arrears, (concluding with a verification): 2nd plea, as to the taking of the residue of the goods, that the plaintiff held one undivided moiety of messuage &c., as tenant of John Aston, at the rent of £66, payable half-yearly; that £208 was in arrear for 3½ years' rent, and that the defendant, as bailiff of John Aston, entered the said messuage, the outer door being open, and took the goods as a distress for those arrears of rent.

In an action of trespass for taking the plaintiff's goods, the defendant pleaded—1st, as to part of the goods, that he took them as a distress for an annuity, payable to M. A.; and, 2ndly, as to the residue, he justified the taking as a distress for rent due to J. A. Replication to the 1st plea, that the annuity was not in arrear; and to the 2nd, non tenuit:—*Held*, that, on these pleadings, the defendant was entitled to begin.

Replication to the 1st plea, that no part of the annuity was in arrear, (concluding to the country); and to the 2nd plea, that the plaintiff did not hold the premises as tenant to John Aston, (also concluding to the country).

Talfourd, Serjt., for the defendant, claimed the right to begin, as the issues lay on the defendant.

R. V. Richards, for the plaintiff.—I go for substantial damages, and I am, therefore, entitled to begin. I must prove the value of the goods taken; and where a plaintiff goes for uncertain damages, he is entitled to begin, though the issues are all on the defendant.

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PATTESON, J.—That is only in cases of assault, libel, and the like.

Talfourd, Serjt., cited the case of *Carter* v. *Jones* (*a*).

PATTESON, J.—There was a case where a party brought an action of trespass against the defendant for taking his goods, and the defendant justified under a warrant of distress for a poor's rate (*b*). There the plaintiff must, as in

(*a*) Ante, Vol. 6, p. 64.

(*b*) The case of *Burrell* v. *Nicholson*, ante, Vol. 6, p. 202.

The case of *Carter* v. *Jones* is differently reported, ante, Vol. 6, p. 64, and in 1 M. & Rob. 281. According to our report of the case, the Lord Chief Justice *Tindal* said, that the Judges had come to a resolution that "in future the plaintiff should begin in all actions for *personal injuries*, and also in *slander and libel*, notwithstanding the general issue may not be pleaded, and the affirmative be on the defendant;" but in the other report of the case, the observations of his Lordship are stated to be, that, "in cases of *slander*, *libel*, *and other actions*, *where the plaintiff seeks to recover actual damages of an unascertained amount*, he is entitled to begin, although the affirmative of the issue may in point of form be with the defendant." We have every reason to believe that our report of the case of *Carter* v. *Jones* is correct; and it will be seen that, if the rule was, that the plaintiff should begin in all cases where he seeks to recover "*actual damages* of an *unascertained amount*," the plaintiff should have begun in the following cases, in all of which, it was held that the defendant should begin: viz. *Burrell* v. *Nicholson*, ante, Vol. 6, p. 202, and 1 M. & Rob. 304, which was an action for taking the plaintiff's goods, and the defendant justified under a distress warrant for a poor rate; *Bastard* v. *Smith*, 2 M. & Rob. 129, an action of trespass on land, with an affirmative justification; *Reeve* v. *Underhill*, ante, Vol. 6, p. 773, and 1 M. & Rob. 440, an action of covenant for not assigning a lease, and taking fixtures, to which there was a plea of fraud; *Lewis* v. *Wells*, ante, Vol. 7, p. 221, an action of covenant for non-repair, with affirmative pleas; *Harnett* v. *Johnson*, ante, p. 206, and the foregoing case of *Aston* v. *Perkes*. In the case of *Wootton* v. *Barton*, 1 M. & Rob. 518, which was an action on a covenant to re-purchase stock at the end of a term, to which the defendant pleaded that the plaintiff had removed all the valuable part of the stock, and left nothing but worthless goods, on which plea issue was joined—*Thesiger*, for the defendant, claimed the right to begin, and cited the case of *Carter* v. *Jones*, from ante, Vol. 6, p. 64.—*Bompas*, Serjt., for the plaintiff, said, that Lord *Denman*, Lord Chief Justice *Tindal*, and Lord *Abinger*, had all decided, that where damages were the object of the action, and these da-

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the present case, have had to prove the value of the goods; but there, it was held that the defendant should begin, the real question in the cause not being the value of the goods, but whether the plaintiff was rateable or not. I shall act upon that case. I shall hold that the plaintiff is entitled to begin.

Talfourd, Serjt., opened his case.

The trial lasted a great part of two days; and the jury found a

Verdict for the defendant on the 1st issue, and for the plaintiff on the 2nd issue, with £250 damages.

R. V. Richards and *Whateley*, for the plaintiff.

Talfourd, Serjt., and *Whitmore*, for the defendant.

[Attornies—*Corser* and *Turner*.]

mages were unascertained, the plaintiff should begin; and he referred to the case of *Carter* v. *Jones*, 1 M. & Rob. 281. Baron *Parke* said,—"The only rule laid down by the Judges was, that, *in actions for personal injuries, where damages are sought as in actions of assault &c., and in libel and slander*, the plaintiff should begin. The general rule is, that the party on whom the issue is shall begin. This was not altered by the resolution of the Judges referred to in *Carter* v. *Jones*. I shall rule that the defendant is entitled to begin." From these authorities, it would appear that the resolution of the Judges is correctly stated in the report of *Carter* v. *Jones*, ante, Vol. 6, p. 64. In the case of *Absalom* v. *Beaumont*, tried before Lord *Denman*, C. J., in 1837, and which is shortly reported in a note, 1 M. & Rob. 441, which was an action on a fire policy, with affirmative pleas, Lord *Denman* held, that the plaintiff was entitled to begin; and in *Harrison* v. *Gould*, ante, Vol. 7, p. 580, which was an action for a breach of promise of marriage, with an affirmative plea, Lord *Abinger* and Mr. Justice *Gaselee* held, that the plaintiff was entitled to begin; but, with respect to this last case, it may be observed, that a breach of promise of marriage is a personal injury, and was so held in the case of *Chamberlain* v. *Williamson*, 2 M. & S. 408. See also the cases of *Hoggett* v. *Exley*, and *Osborn* v. *Thompson*, post.

1840.

REGINA *v.* WHITTINGHAM and DANIEL.

The bottom of the shaft of a mine had water in it, and the owner of the mine had caused a scaffold to be erected at some distance above the bottom of the mine for the purpose of working a vein of coal which was on a level with the scaffold:—*Held*, that this scaffold was an "erection used in the conducting the business" of a "mine," within the stat. 7 & 8 Geo. 4, c. 30, s. 7, and that the damaging it with intent to destroy it, or to render it useless, was felony.

A coal mine was worked by a steam-engine which caused a cylinder called a drum to revolve and take up the rope as the coal was drawn up from the mine:—*Held*, that proof of damaging the drum would not support an indictment which charged the damaging of a steam-engine used in working a mine.

INDICTMENT on the stat. 7 & 8 Geo. 4, c. 30, s. 7. The first count of the indictment charged the prisoners with damaging a steam-engine employed in working a mine with intent to destroy it; 2nd count—the like, but laying the intent to be to render it useless; 3rd count—for damaging a certain erection used in the working of a mine with intent to destroy it; 4th count—the like, but laying the intent to be to render it useless.

It appeared that the mine, which was a coal mine at Woolstanton, was worked by a steam-engine which caused a cylinder called a drum to revolve and take up the rope as the coal was drawn up from the mine. At the other end of this rope was a heavy weight called a bull, which the prisoners threw into the shaft of the mine, and by the sudden jerk caused the drum to be strained and injured. It further appeared that the bottom of the shaft was filled with water, and that Mr. Williamson, the owner of the mine, had caused a scaffold to be erected at some distance above the bottom of the mine for the purpose of working a vein of coal that was on a level with the scaffold; and it further appeared that the prisoners took a sort of waggon called a corve and threw it down the shaft, whereby the scaffold was much injured.

Godson and *E. Yardley*, for the prisoners, objected that as the drum was no part of the steam-engine, the first and second counts could not be supported.

PATTESON, J.—I think that is so.

Godson and *E. Yardley*, submitted that this scaffolding was not an "erection used in conducting the business of a mine" within the stat. 7 & 8 Geo. 4, c. 29, s. 7, the words of which were, "any staith, building, or erection used in

conducting the business of any mine," and that the word "erection" being used in conjunction with the words "staith or building," must be taken to be an erection ejusdem generis.

F. V. Lee, for the prosecution.—As the statute uses the word "erection" as well as the word "building," it is manifest that something more than buildings were intended to be included within its provisions. This scaffolding is absolutely necessary to enable the prosecutor to work his mine, and is therefore an erection "used in conducting the business" of the mine.

PATTESON, J.—I think that this is a case within the act of Parliament. The word "erection" is clearly meant to denote something different from a "building."

Verdict—Guilty.

F. V. Lee and *Allen*, for the prosecution.

Godson and *E. Yardley*, for the prisoners.

[Attornies—*Wedgwood* and *W. Williams*.]

See the case of *Reg.* v. *Norris*, post, p. 241.

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(*Crown Side.*)

BEFORE MR. BARON GURNEY.

REGINA *v.* ASHMALL and TAY.

A. was indicted for felony in using an instrument to procure abortion, and B. was indicted with him as an accessary before the fact. A. did not appear to take his trial, but B., who was on bail, appeared.

Held, that, under these circumstances, B. was not compellable to plead to the indictment, and the Judge allowed B. to be admitted to bail.

ABORTION.—The indictment was in the following form:—"Staffordshire to wit.—The jurors for our Lady the Queen, upon their oath present, that Thomas Ashmall, late of &c., on &c., at &c., feloniously, unlawfully, and maliciously, did use a certain instrument, the name of which instrument is to the jurors unknown, by then and there forcing, thrusting, and inserting the said instrument into the private parts of Hannah Lear, now known by the name of Hannah Evans, with intent in so doing then and there and thereby to procure the miscarriage of the said Hannah Lear, now known by the name of Hannah Evans, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her Crown and dignity; and the jurors aforesaid, upon their oath aforesaid, do further present, that Thomas Josiah Tay, late of &c., before the committing of the felony by the said Thomas Ashmall as aforesaid, to wit, on &c., at &c., feloniously did procure, counsel, and command the said Thomas Ashmall, the felony aforesaid, in manner and form aforesaid, to commit, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her Crown and dignity."

At the sitting of the Court Mr. Ashmall was called, but did not appear. Mr. Tay, who had been on bail, appeared. The indictment was read to him.

Godson, for the defendant Tay.—I submit that my client is not compellable to plead to this indictment. He is indicted as an accessary, and as an accessary only. Formerly

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REGINA v. ASHMALL.

an accessary before the fact could, in no case, be brought to trial without his principal, except after the conviction of his principal, or by his own consent. But now, by the stat. 7 Geo. 4, c. 64, s. 9, accessaries before the fact may be tried in either one of three modes:—1st, with the principal; 2nd, after the conviction of the principal felon; or 3rd, for a substantive felony. This indictment is not for a substantive felony, because every thing charged against Mr. Tay is charged as having been done accessarially to Ashmall; and what shews decisively that Mr. Tay is charged as an accessary only, is, that if Mr. Ashmall was acquitted on this indictment, Tay must be acquitted also as a legal consequence.

Carrington, on the same side.—At the time of the passing of the act 7 Geo. 4, c. 64, I had occasion to compare it with all the previous enactments on the subject, and I believe I am correct in stating that the only alteration in the law then made, as to the trial of accessaries without and before the conviction of the principal, was by the provisions relating to the accessary being indicted for a substantive felony. I submit, also, that an indictment for a substantive felony must be so framed as not to depend on the conviction or acquittal of any person, except the party who is charged with the substantive felony; indeed, the ordinary counts for the substantive felony of being accessary, do not even name the principal, but merely state him to be "a certain evil-disposed person" (*a*).

GURNEY, B., (after conferring with *Patteson*, J.)—My

(*a*) See the cases of *Rex* v. *Jervis*, ante, Vol. 6, p. 156, and *Rex* v. *Wheeler*, ante, Vol. 7, p. 170. In the case of *Reg.* v. *Caspar*, in which the indictment was held by the fifteen Judges to be good as an indictment against the receivers for a substantive felony, it was charged that "a certain evil-disposed person" stole 102lb. of gold-dust, and that the receivers the said gold-dust "before then feloniously stolen, taken, and carried away in manner and form aforesaid, feloniously did receive," &c.

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REGINA v. ASHMALL.

learned Brother *Patteson* concurs with me in opinion, that Mr. Tay is not compellable to plead to this indictment at present. There might have been an indictment against him for a substantive felony, but this is not so.

Mr. Tay did not plead to the indictment.

Godson applied that Mr. Tay should be admitted to bail, and bail was taken (*a*).

Corbett for the prosecution.

Godson and *Carrington* for the defendant Tay.

[Attornies—*Turner* and *Manby & Hawks.*]

(*a*) As to the practice respecting bail in cases where the party is charged with a capital offence, see the case of *Reg.* v. *Guttridge*, ante, p. 228.

REGINA *v.* OWEN, ELLIS, and THOMAS.

On a trial for murder, the deposition on oath of the prisoner, taken before the coroner, on the inquest held on the body of the deceased, is not receivable in evidence.

MURDER.—The prisoners were charged with the murder of Christina, the wife of Robert Collins, by drowning her.

This case had been postponed from the last assizes (*a*).

On the part of the prosecution, *Ludlow*, Serjt., proposed to give in evidence the depositions of the prisoners taken on oath, on the coroner's inquest held on the body of the deceased.

GURNEY, B.—Can you cite any instance where a deposition of this kind taken on oath has been received in evidence against a prisoner?

Ludlow, Serjt.—These very depositions were received

(*a*) See the case of *Reg.* v. *Owen*, ante, p. 83.

in evidence by Mr. Justice *Williams*, on the trial of these prisoners for a rape at the last assizes, and that learned Judge said, that he would receive the evidence and reserve the question for the opinion of the fifteen Judges, if it should become necessary (*a*).

GURNEY, B.—If the evidence be necessary and it is doubtful whether it be receivable in a criminal case, the Judge will receive the evidence, because that is the only way to have the point considered by the Judges. In civil cases the Judge may reject the evidence, and there may be a new trial. I am not aware of any instance in which an examination on oath before a coroner or a magistrate has been admitted as evidence against the person making it. I have known depositions before magistrates, made by prisoners on oath, and they have been uniformly rejected. In my own experience I do not recollect a case of a deposition before a coroner.

Ludlow, Serjt.—Mr. Roscoe says (*b*), "A question sometimes arises, whether a statement which has been made by a party upon his examination as a witness, can be given in evidence against him, if he should himself be put upon his trial for the same offence. The general rule is, that admissions made under compulsory process are evidence against the party." So it is said by Mr. Starkie (*c*), that "when a witness answers questions on his examination on a trial tending to criminate himself, and to which he might have demurred, his answers may be used for all purposes."

Godson, for the prisoners.—In the case of *Regina* v. *Wheeley* (*d*), the prisoner, who was tried for the murder of his wife, had made a deposition before the coroner which

(*a*) See ante, p. 86.
(*b*) Rosc. Crim. Ev. p. 45.
(*c*) 2 Stark. Ev. 2nd edit., p. 28.
(*d*) Ante, Vol. 8, p. 250.

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purported to have been taken on oath, and Baron *Alderson* would not allow it to be given in evidence, and also would not admit evidence to be given to shew, that the deposition was, in point of fact, not taken upon oath.

GURNEY, B.—I think that I ought not to receive it.

E. Yardley, for the prisoners, referred to the case of *Rex* v. *Lewis* (*a*).

GURNEY, B.—There was a case before my Brother *Coleridge* on the Northern Circuit where a person was indicted for forgery, and my Brother *Coleridge* allowed his deposition before the Commissioners of Bankrupts to be read in evidence against him (*b*). I confess that I do not, on principle, see the distinction between that and some of

(*a*) Ante, Vol. 6, p. 161.

(*b*) *Wheater's case*, 2 Lewin's C. C. 157. In that case, which was tried at the York Spring Assizes, 1838, the prisoner was indicted for forgery, and it was proposed to give in evidence against him his deposition taken *on oath* before commissioners of bankrupt. It was objected that the deposition was inadmissible as not being a voluntary statement; but to this it was answered, that when before the commissioners the prisoner was not charged with any crime, and the case of *Rex* v. *Merceron* (2 Stark. N. P. C. 366) was relied on. The evidence was received, and the prisoner was convicted, and Mr. Justice *Coleridge* reserved the point, and the Judges after argument by Mr. *Starkie*, for the Crown, and Mr. *Dundas*, for the prisoner, were of opinion that the evidence was admissible. But in the case of *Rex* v. *Britton*, tried on the Western Circuit in the year 1833, (1 M. & Rob. 297), on an indictment against a bankrupt for concealing his effects, it was proposed to prove the petitioning creditor's debt, by putting in the bankrupt's balance sheet, which he delivered in upon oath. It was objected for the defendant, that the proceedings under the commission could not in any way be given in evidence to affect the defendant, until the validity of the commission was established. At all events, that the defendant's examination, under which the balance sheet was given in, being compulsory and on oath, could not be brought forward to affect him criminally, as it was obtained from him under a sort of duress. "*Patteson*, J., after consulting with *Alderson*, J., said he was clearly of opinion, that the balance sheet could not be evidence against the defendant to prove the petitioning creditor's debt."

the other cases. Still I am of opinion that, in the present case, I ought to reject the evidence.

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REGINA v. OWEN.

Evidence rejected.

The jury found all the three prisoners guilty; and two of them (Owen and Thomas) were executed, the sentence of the other prisoner being commuted for transportation for life.

Ludlow, Serjt., and *F. V. Lee*, for the prosecution.

Godson, *E. Yardley*, and *Beadon*, for the prisoners.

[Attornies—*Horton* and *Passman*.]

REGINA *v.* NORRIS and Others.

THE prisoners were indicted on the 7 & 8 Geo. 4, c. 30, s. 7, for feloniously, unlawfully, and maliciously damaging, with intent to destroy it, a certain steam-engine used in the draining and working of a mine; 2nd count, for damaging the engine with intent to render it useless.

A steam-engine used in draining and working a mine, had been stopped and locked up for the night. The prisoner got into the engine-house and set it going, and there being no machinery attached, the engine went with great velocity and received damage:—*Held*, that this was a damaging of the engine within the stat. 7 & 8 Geo. 4, c. 30, s. 7.

It appeared, that the steam-engine was used to bring up coals from one shaft of the mine, and water from another, and that it was stopped and locked up on the evening of the 3rd of March, and that the prisoners on that night got into the engine-house and set the engine going, and from its having no machinery attached to it, the engine worked with greater velocity, and the wheels were some of them thrown out of cog, so that the engine was damaged to the amount of £10, and would have been injured to a much greater extent, if the mischief had not been discovered and the engine stopped.

GURNEY, B., left it to the jury to say, whether the intent of the prisoners was to destroy the engine, or to ren-

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der it useless; and held, that, if the prisoners had either of those intents, the case came within the provisions of the statute (*a*).

The jury found the prisoners guilty.

F. V. Lee, for the prosecution.

[Attorney—*Hinchcliffe.*]

(*a*) See the case of *Reg.* v. *Whittingham*, ante, p. 234.

SHREWSBURY ASSIZES.

(*Civil Side.*)

BEFORE MR. BARON GURNEY.

The MAYOR, ALDERMEN, and BURGESSES, of LUDLOW, v. CHARLTON, Esq.

Primâ facie, it must be presumed that the books of a corporation, which existed before the municipal reform act, are in the possession of the new corporation which succeeded them under that act; but if it be shewn that the old corporation, before their dissolution, deposited them with a banker, and that from his hands they passed into the Master's office of the Court of Chancery, this rebuts the presumption.

COVENANT.—The declaration stated, that on the 25th of March, 1820, the bailiffs, burgesses, and commonalty of the borough of Ludlow, demised certain lands, called

In an action brought by the new corporation, it appeared that the defendant had presented a petition to the Vice-Chancellor to allow the production of these books on the present trial, which petition was opposed by the present plaintiffs, and dismissed with costs.

Held, that under these circumstances the defendant was entitled to give parol evidence of the contents of the books.

The document delivered out by the registrar of the Court of Chancery, as the order of the court, is the original order, and to make it evidence, it is not necessary that it should be compared with any book of the orders of the court.

A corporation came to a vote that if C. would alter the site of a house, the corporation would pay him £500.—This resolution was entered in the corporation book, and C. altered the site of the house:—*Held*, that the resolution was not valid, as it was not under the corporate seal.

An old corporation, before the municipal reform act, were trustees of a charity, and a tenant of the charity had paid rent to the secretary to the old corporation up to Lady-day, 1836:—*Held*, that this was a good payment, and might be taken advantage of in an action brought by the new corporation for the rent.

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the Foldgate Farm, to the defendant for a term of twenty-one years, at a rent of £150 a year, which rent the defendant covenanted to pay. Breach, that a sum of 375*l.* 13*s.* 5*d.* was unpaid. Pleas, 1st, payment; 2nd, a set-off of £600, agreed to be paid to the defendant for pulling down and altering the site of a house, called the Charlton Arms, and for altering a roadway, and also for work, labour, and materials, and for money lent; 3rd, a special plea, which stated in substance, that it was agreed between the old corporation of Ludlow and the defendant, that he should alter the situation of the Charlton Arms, and be paid £500 for making the alterations; and that it was agreed that these sums should be set against the rent, and the plea went on to aver that the defendant had made the alterations. Replication, taking issue on each of the pleas.

The defendant's counsel began.

It was opened by *Talfourd*, Serjt., for the defendant, —that the Foldgate Farm had been demised to the defendant by the old corporation of Ludlow, as trustees of a charity, the rights of the old corporation having been transferred to the new corporation by the stat. 5 & 6 Will. 4, c. 76, and that the present claim was for rent due for three and a half years up to Michaelmas, 1835. He stated also, that the defendant had paid the half-year's rent due at Lady-day, 1836, to Mr. Morris, the secretary of the old corporation, and that would raise a presumption that the earlier rent had been paid; but the case would not rest on presumption only; as it would be shewn that, in the year 1835, the road from Ludlow to Hereford had been changed, which was a great public improvement, but the public did not get the full benefit of it in consequence of the Charlton Arms, an inn belonging to the defendant, being inconveniently placed in respect of the new road; and it would be proved, that, at a meeting of the old corporation, on the 28th of October, 1835, they

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came to a resolution to offer the defendant £500, if he would alter the site of the Charlton Arms, and also alter a road near it, so as to complete the improvement made by the new Hereford road. This proposal was acceded to by the defendant, who took down a part of the inn, and rebuilt it on a different site, and also altered the road according to the plan proposed.

It was proved by Mr. Sankey, who was high bailiff of Ludlow in 1834 and 1835, that the alteration of the Hereford road had been made, and that at the meeting of the old corporation, on the 28th of October, 1835, (the 28th of October being the charter day), a resolution was come to respecting the Charlton Arms.

Talfourd, Serjt, called for the book in which this resolution was entered.

Ludlow, Serjt., for the plaintiffs.—We admit the notice to produce, but it must be shewn that the books are with us.

GURNEY, B.—I think that primâ facie the present corporation must be presumed to have the possession of the books of the old corporation.

Mr. Sankey, in answer to questions put by *Ludlow*, Serjt., said, "The books are in Chancery; the old corporation lodged them at a banker's in Ludlow, just before our civil death; we did it to keep them under our control."

GURNEY, B.—This puts them out of the possession of the plaintiffs.

R. V. Richards, for the defendant.—The rights of the old corporation are transferred to the new corporation, and is not the present like the case of a partner, who is not a

party in the action, having removed the books? in which case I submit that notice to produce given to the partners who were parties to the action would be sufficient.

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GURNEY, B.—It strikes me that that is hardly so; you call on the new corporation to produce something which they not only have not got, but which your witness says was kept out of their power. Shew me that the plaintiffs have a control over these books, and can produce them, and I shall have no difficulty.

Mr. George Smith was called. He said, "I am the agent of the defendant's attorney. I produce a petition to the Lord Chancellor respecting the production of these books. It was opposed on behalf of the corporation of Ludlow."

Ludlow, Serjt.—This petition is res inter alios.

GURNEY, B., (having looked at the petition).—The petition states that the books are in the Master's office. The defendant asks their production, and the plaintiffs oppose it.

Ludlow, Serjt.—This is not a petition between the defendant and the corporation.

GURNEY, B.—The defendant is endeavouring to give secondary evidence, because he cannot give primary evidence; and with this view he wishes to shew that he cannot give primary evidence, because you prevent him from having the books here.

Ludlow, Serjt.—The petition is presented—In the matter of certain charities.

Whateley, for the plaintiffs.—The petition is intitled—In

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the matter of certain charities, and in the matter of the 5 & 6 Will. 4, c. 76 (the municipal corporation act); and it states that the clerk of the Master declines to produce the books on this trial, without an order of the court, or the consent of the new corporation. This is all that is alleged in the petition. Mr. Smith says the petition was opposed, but that is no proof that it was opposed by us.

GURNEY, B.—Mr. Smith said that it was opposed on the part of the corporation of Ludlow—I must receive the petition in evidence.

In answer to further questions, Mr. George Smith said, "I was in court when the petition was heard before the Vice-Chancellor, on the 14th of March. Mr. Kinderley appeared, and opposed it for the corporation."

The petition was received. It was intitled—In the matter of several of the Ludlow charities (naming them), and in the matter of the 5 & 6 Will. 4, c. 76, (setting out its title). It stated that this cause was at issue, and stood for trial at the present assizes; and that these books were material evidence for the defendant, and prayed that the clerk of the Master should attend with them at these assizes.

The order was put in: it recited the petition, and "counsel for the petitioners and counsel for the corporation of Ludlow attending," it ordered that the petition should be dismissed with costs.

R. V. Richards proposed to ask Mr. Smith what the Vice-Chancellor said in giving judgment, but afterwards withdrew the question.

Ludlow, Serjt.—Is the paper put in as the Vice-Chancellor's order—the original order?

Mr. George Smith.—"I obtained it myself from the registrar's office. It is an order in the usual form, obtained

in the usual manner. I received it from the registrar as the Vice-Chancellor's order."

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Ludlow, Serjt.—The order should have been examined with the original book.

GURNEY, B.—No: what the registrar delivers out is the order.

Ludlow, Serjt.—Does your Lordship consider this as sufficient proof of the order?

GURNEY, B.—Certainly.

Talfourd, Serjt.—I propose to ask the contents of the resolutions of the corporation of the 28th of October.

Ludlow, Serjt.—I submit that that evidence is not receivable. The old corporation deposit the books with a banker—they then get to the Court of Chancery, and are lodged in the Master's office—the Master's clerk declines to produce them without the consent of the corporation or an order of the Court of Chancery, and a petition is presented, which is dismissed.

GURNEY, B.—The counsel for the corporation resisting it.

Ludlow, Serjt.—That evidence was withdrawn.

GURNEY, B.—The fact, that the counsel for the corporation appeared and resisted the petition, is proved. That is quite different from hearing all that was said.

Ludlow, Serjt.—From the order it does not appear that Mr. Kindersley did more than appear and refer himself to the Court. How can we be said to be in any default from the non-production of the books, when a Court of compe-

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tent jurisdiction has said they should not be produced? The most that can be said, is, that the corporation would not consent to a production which the Vice-Chancellor would not order. And why did the defendant not subpœna the Master's clerk to produce the books? and if the Master's clerk had produced the books on a subpœna duces tecum, no secondary evidence would have been necessary.

Whateley.—These books never were in the possession of the plaintiffs; and it might be, that they would not consent to the prayer of the petition without the defendant's undertaking to pay the costs of bringing them down. If a subpœna had been served on the Master's clerk, the Judge at the trial would have decided whether the books ought to have been produced or not. It is clear from the dismissal of the petition with costs, that the Vice-Chancellor thought that the plaintiffs were not to blame.

GURNEY, B.—In this case the defendant has done all that he can to obtain the books. I do not think it is for a plaintiff to go into the Court of Chancery to oppose the production of books, and then come to the Assizes and oppose the reception of secondary evidence because the books are not produced. I shall receive secondary evidence.

Mr. Sankey was recalled to prove the contents of the resolutions. He stated that there was no stamp on the book.

Ludlow, Serjt., objected that the book should have been stamped.

GURNEY, B.—I will receive the evidence, subject to the objection as to the stamp.

It appearing afterwards that Mr. Sankey had never seen the original book, it was proved by Mr. Downes, the

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present town clerk of Ludlow, that the resolution was in the following terms (he asking for a printed copy of the entry in the book, which was given to him by *Talfourd*, Serjt., instead of his stating the contents of the resolutions from memory). The resolution was as follows:—

"28th October, 1835.

"Resolved—That £500 be paid to Mr. Charlton to alter the Charlton Arms Inn according to the plan produced by Mr. Atkins, if he will give his consent to the alteration.

"Mr. Charlton then addressed the meeting, and stated that he had no objection to the Charlton Arms Inn being altered according to the plan produced, and on receiving £50 to alter the present road to the stables if Mr. Stead thought that such sum would be necessary to make a convenient approach to the stables.

"The thanks of the meeting were then given to Mr. Charlton for the readiness he has shewn to accommodate the public."

It was proved that the defendant had made the alterations at the Charlton Arms and at the road, which were finished early in the year 1836, the expense being above £500.

With respect to the payment of 75*l.* 13*s.* 5*d.* for the half-year's rent, paid on the 31st of March, 1836, Mr. Morris was called. He said: "I was secretary to the late corporation as charity trustees; I was appointed on the 27th January, 1836; the old corporation continued to act as charity trustees till October, 1836 (*a*). In March, 1836, Mr. Charlton paid me rent, and I gave him a receipt. The new corporation had come into office on the 26th of December, 1835, but those who had been the old corporation continued to act as charity trustees till the October following; the Foldgate Farm is a charity estate."

(*a*) Under sect. 71 of the Municipal Corporation act, 5 & 6 Will. 4, c. 76.

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Ludlow, Serjt.—The receipt of the charity trustees is no evidence against the new corporation. They were not then the old corporation, as that was defunct. They are not the new corporation, but quite a distinct body.

Talfourd, Serjt.—The present plaintiffs are now the representatives of the old corporation, and in that character only can they sue here at all. The old corporation were to continue trustees of the charities after they ceased to be the corporation.

GURNEY, B.—This was a lease granted by the old corporation. It was a grant of charity land. It is rather a nice point; but, as the legislature continued the old corporation as charity trustees, I think that during the time that they were so continued trustees, they had a right to receive the rents of the charity estates.

Ludlow, Serjt., addressed the jury for the plaintiffs.

GURNEY, B. (to the jury).—The only question I can leave to you is, whether there was a contract between the old corporation and Mr. Charlton, which he has performed on his part. You will therefore say whether the corporation agreed to pay the defendant £500 to alter the Charlton Arms, and whether he has done so. The third plea is not proved. The defence, therefore, rests on the set-off as to all but the 75*l.* 13*s.* 5*d.*, and the question is, whether, if Mr. Charlton had brought an action, he could have recovered.

The foreman of the jury—"We find that the agreement was made, and that Mr. Charlton performed it."

GURNEY, B., directed a verdict to be entered for the plaintiffs for £300, being the balance of the rent after deducting the 75*l.* 13*s.* 5*d.* paid to Mr. Morris; his Lord-

ship giving *Talfourd*, Serjt., leave to move to enter a verdict for the defendant, if the Court of Exchequer should be of opinion that the resolutions contained in the corporation book did not require a stamp.

Ludlow, Serjt., and *Whateley*, for the plaintiffs.

Talfourd, Serjt., *R. V. Richards*, and *F. V. Lee*, for the defendant.

[Attornies—*Downes* and *Hill*.]

In the ensuing Term, *Talfourd*, Serjt., applied to the Court of Exchequer, in pursuance of the leave given, for a rule to shew cause why the verdict should not be entered for the defendant, or why there should not be a new trial on payment of costs, to give the defendant an opportunity of getting the resolution stamped. The Court granted a rule to shew cause, which after argument was discharged, upon the ground that the resolution of the corporation was not valid, it not being under the corporate seal—the Court gave no opinion on the question of the stamp.

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DAVIES *v.* DAVIES.

On an application for a new trial, one of the witnesses made an affidavit. The same witness was called on the second trial. It was proposed to cross-examine the witness from an office-copy of her affidavit, which was ordered by a Judge's order (in the usual form) to be admitted as a true copy:—*Held*, that this might be done, and that it was not necessary to have the original affidavit to cross-examine upon.

THIS was a new trial of the case reported, ante, p. 87.

One of the witnesses for the defendant was his sister Eliza, who was examined on the former trial, and also made an affidavit for the defendant, in shewing cause against the rule for a new trial in the Court of Exchequer.

Talfourd, Serjt., for the plaintiff, put an office copy of the affidavit made by the witness in the Exchequer into her hand, and proposed to cross-examine her upon it.

R. V. Richards, for the defendant.—To entitle the other party to cross-examine upon an affidavit, the original affidavit must be put into the hand of the witness.

Talfourd, Serjt., put in the following order to admit, made by the Lord Chief Justice *Tindal*:—

"*Davies* v. *Davies*.

"Upon hearing the attornies or agents on both sides, and by consent, I do order that the defendant at the trial of this cause hereby make the admissions specified in the notice, served by the plaintiff's attorney or agent upon the defendant's attorney or agent, dated the 7th of March, 1840.

"Dated the 12th of March, 1840. N. C. TINDAL."

To this order was annexed a notice to admit, which was dated the 7th of March, and was in the following form:—"Take notice, that the plaintiff in this cause proposes to adduce in evidence the following documents hereunder specified, and that the same may be inspected by the defendant, his attorney or agent, at my office, &c., on &c., and that the defendant will be required to admit that such of the said documents as are specified to be originals, were respectively written, signed, or executed, as they purport respectively to have been; that such as are specified as copies, are true copies, and such documents as are stated

to have been served, sent, or delivered, were so served, sent, or delivered respectively, saving all just exceptions to the admissibility of all such documents as evidence in this cause." Dated &c.

Description of Documents.	*Date.*	*Original or Duplicate served, sent, or delivered, when, how, and to whom.*
Affidavit of Elizabeth Howells, sworn in this cause, and filed in the Court of Exchequer of Pleas.	1839. 14th Nov.	Office copy.
Affidavit of Eliza Davies, sworn in this cause, and filed in same Court.	15th Nov.	Office copy.

R. V. Richards.—This is only an order to admit the copy, "saving all just exceptions to the admissibility of all documents as evidence in this cause." Those are the very words of the notice to admit.

Talfourd, Serjt., for the plaintiff.—But the notice also states that the defendant will be required to admit "that such as are specified as copies are true copies." In the case of *Highfield* v. *Peake* (*a*), on the trial of an issue out of Chancery, an examined copy of the deposition of one of the witnesses was allowed to be read for the purpose of contradicting the evidence of the same witness on the trial of the issue; and if an examined copy of the deposition was receivable in that case, I submit that an office-copy admitted to be a true copy under the Judge's order would be receivable here.

GURNEY, B.—I think that I ought to allow the cross-examination from the office-copy.

Talfourd, Serjt., cross-examined from the office-copy of the witness's affidavit.

Verdict for the defendant.

(*a*) M. & M. 109.

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DAVIES v. DAVIES.

Talfourd, Serjt., *Carrington*, and *Thomas*, for the plaintiff.

R. V. Richards and *Whateley*, for the defendant.

[Attornies—*B. Wallington*, and *Stanley & Heane*.]

DOE, on the Demise of HADEN and Another, *v.* BURTON.

In ejectment by parish officers to recover a cottage, entries in the books of a deceased tradesman, of charges for the building of the cottage, which are there stated to have been paid by the lord of the manor, are not admissible in evidence on the part of the defendant.

If A. be put into possession of a cottage by parish officers, and the lord of the manor prevail on A. to give up the possession of the cottage to him, and the lord of the manor put B. into possession, and the parish officers bring an ejectment against B., B. cannot set up a title in the lord of the manor, as under these circumstances neither the lord of the manor nor B. can set up any title which A. could not set up; and if the cottage really belonged to the lord of the manor, he must bring an ejectment for it.

EJECTMENT to recover a cottage situate at Donnington.

It was opened by *R. V. Richards*, for the plaintiffs, that the cottage in question was a parish-house, which had belonged for many years to the parish of Donnington, and had been repaired by them; and that the parish officers had put a pauper family, named Burchall, into the cottage; and that Mr. Bishton, who claimed to be lord of the manor, had prevailed on them to go to another cottage, and he had put the present defendant into this cottage. Upon this state of facts he submitted, that Mr. Bishton, coming in under a person put in by the parish officers, could not dispute the title of the parish officers, and that the defendant coming in under Mr. Bishton could not set up any defence which Mr. Bishton could not set up. He cited the cases of *Doe*, on the demise of *Bullen* v. *Mills* (*a*), and *Doe*, on the demise of *Knight* v. *Lady Smythe* (*b*).

(*a*) 2 Adol. & El. 17. In that case, premises, being in possession of a tenant under a lease, a party claiming them by an alleged title adverse to that of the lessor, and prior to the lease, demanded them of the lessee, and obtained possession by paying him £20. The lessor brought ejectment against the person so in possession, the term having been forfeited, and it was held that the defendant could not set up his adverse title against the landlord.

(*b*) 4 M. & S. 347. In that case the person in possession had come in under an agreement with the

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It was proved that the parish officers had put paupers into the cottage, and removed them from it, and had done repairs; and that in the year 1825 Burchall and his family were put in by the overseers. It was also proved by the widow of Burchall, that she gave up the cottage to Mr. Bishton, who put her into a cottage he had recently built.

It was opened by *Talfourd*, Serjt., for the defendant, that Burchall and his family were put in by the parish officers, and Mr. Bishton, as lord of the manor, jointly, and that the cottage was originally built by Mr. Bishton.

On the part of the defendant, Mr. Nicholson was called. He stated that his grandfather (now deceased) had been a builder, and he produced his grandfather's books.

Talfourd, Serjt., proposed to put in an entry in the deceased Mr. Nicholson's books, to shew that he had built this cottage, and that Mr. Bishton had paid him for so doing. He cited the case of *Rex* v. *Inhabitants of Hendon*, in which Lord *Denman* allowed the books of a deceased person who repaired a bridge, to be given in evidence, to shew that the parish had paid him for so doing.

R. V. Richards.—The principle on which entries of this kind are admitted is, that by making the entry the person charges himself to some other person; and the courts began by admitting the entries of deceased stewards and receivers who, by their entries, charged themselves to their employers. In later cases the courts have, under particu-

lessor of the plaintiff, and had paid rent to him, and afterwards disclaimed; it was held, that a third person could not defend as landlord, and dispute the lessor of the plaintiff's title; and *Bayley*, J., said, "the tenant should have given up the possession to Knight, and the defendant, if she has title, might have maintained her ejectment."

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lar circumstances, gone further. In the case of *Higham* v. *Ridgway* (*a*), on a question as to the day on which a child was born, the books of a deceased accoucheur, with the entry marked "paid," were received as evidence of the time of the birth; and in the case of *Doe*, on the demise of *Patteshall* v. *Turford* (*b*), and *Poole* v. *Dicas* (*c*), entries of deceased clerks of business done in attorneys' offices (in the one case the service of a notice to quit, and in the other the making of a tender) were received in evidence. But this is a mere entry of a tradesman in his own book that he has received this money; and if this entry were evidence, the books of every tradesman would be evidence for and against third persons as soon as he was dead (*d*). In the case of *Doe*, on the demise of *Gallop*, v. *Vowles* (*e*), it was held, that a deceased tradesman's bill for repairs, with his receipt thereon, was not evidence of the work having been done for the person charged, though the paper was found among the other papers of the person charged; and Mr. Justice *Littledale* said, "The cases have gone quite far enough. There would be no limit if such a paper as this were admitted."

GURNEY, B.—I have great doubt about this being evidence. I think I ought not to receive it.

The evidence was rejected.

Evidence was given with a view of shewing that Burchell and his family were put into the cottage by Mr. Bishton and the parish officers jointly, but upon this part of the case the evidence was contradictory.

(*a*) 10 East, 109.

(*b*) 3 B. & Ad. 890.

(*c*) Ante, Vol. 7, p. 79; and 1 Scott, 600.

(*d*) As to the reception of entries in the books of deceased rectors and vicars, as evidence for their successors, see Phill. on Evid. ch. 7, s. 7.

(*e*) 1 M. & Rob. 261.

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GURNEY, B., (in summing up).—The plaintiffs, who are parish officers, seek to recover in this case, because, as they say, they have from time to time put paupers to reside in this cottage, and put in some persons of the name of Burchall, who continued to reside there till Mr. Bishton induced them to leave, and give up the cottage to him. If these persons were put into the cottage by the parish officers, they could give no better title than they themselves had, and Mr. Bishton could set up no defence which they could not; and if the defendant was let into possession by Mr. Bishton, the defendant can set up no title which Mr. Bishton could not. The case for the defendant is, that Mr. Bishton being in possession of the cottage, he and the parish officers jointly put in the Burchalls. Upon that part of the case the evidence is contradictory. If Mr. Bishton and the parish officers did jointly put the Burchall family into the house, Mr. Bishton and those who claim under him will be entitled to contest the right of the parish; but if the parish officers alone put in the Burchall family, (and it is conceded that the parish officers repaired), and Mr. Bishton did not as a matter of right concur in the putting of them in, he cannot in this ejectment contest the title of the parish. However, it is still open to him to bring his ejectment against the parish officers and recover the cottage, if he has really a better title than they have.

Verdict for the plaintiffs.

R. V. Richards, *Whateley*, and *Browne*, for the plaintiffs.

Talfourd, Serjt., and *W. J. Alexander*, for the defendant.

[Attornies—*Corser* and *Glover*.]

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(*Crown Side.*)

BEFORE MR. JUSTICE PATTESON.

REGINA *v.* THOMAS JONES.

Whether, on a count charging a shooting with intent to murder, it is essential that the jury should be satisfied that that intent existed in the mind of the prisoner at the time of the offence, or whether it is sufficient that it would have been a case of murder if death had ensued—*Quære?* But if it be necessary that the jury should be satisfied of the intent; the circumstance that it would have been a case of murder if death had ensued, would of itself be a good ground from which the jury might infer the intent, as every one must be taken to intend the necessary consequences of his own acts.

A. was night-poaching in a wood belonging to B., and B. came up to A., and presented a pistol at him, saying, "Damn you, surrender;" A. said, "Now, don't you," and raised an air-gun, and discharged it, and wounded B. *Semble*, that if B. had died, it would not have been a case of murder.

SHOOTING.—The indictment charged the prisoner with having, on the 17th of December, 1839, shot at Robert Chambre Vaughan, Esq., with a certain air-gun, "charged and loaded with air and a leaden ball," with intent to murder him. The indictment also contained counts charging intents to disable, to disfigure, and to do grievous bodily harm.

On the part of the prosecution, Mr. Vaughan was called: he said—"I reside at Burlton Hall, in this county; I had a gamekeeper named Capp; I, on the night of the 17th of December, in consequence of information, went to a cover on my estate; it was about ten o'clock at night; I concealed myself in some fern in the cover, and heard an air-gun discharged twice; there are pheasants in the cover; I sent Capp to the outside of the cover, and heard a noise of some one coming through the underwood; I looked out, it was a bright clear moonlight night, and I saw a man coming through the underwood at a distance of about 100 yards from me; he got into a path out of my sight; I left my place of hiding, and got into the path, and he was about twelve yards from me; he stopped, and I advanced towards him; I looked at him carefully, and got within a distance of from four to six yards from him; he had a dark velveteen jacket and breeches, and leggings, or gaiters; I saw his face; I do not swear the prisoner is the man, but I firmly believe him to be so; I commanded

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him to surrender; my expression was, 'Damn your blood, surrender, Sir!' I presented my pistol at him; he said, 'Now, don't you;' and he raised his air-gun, and discharged it; the ball struck my left shoulder; I staggered, and my right arm dropped; I raised my pistol again, and fired at him; the path is a private path for me and my keepers; the nearest public path is nearly, but not quite, a quarter of a mile off; I was attended by Mr. Gwynne, the surgeon; I did not come down stairs till the 4th of January; I had not known the prisoner before; I saw him on the 4th of January; he was brought into my dining-room; he had then a rough blue coat on; he spoke, and his voice corresponded as well as his person with that of the man I saw in the wood."

In his cross-examination, Mr. Vaughan, said—"The cover is about ten acres; I said, 'Damn your blood, Sir, surrender,' in a loud and angry tone, I believe; the place is a quarter of a mile from any house; I wore a shooting jacket.

Other evidence was also given to shew the identity of the prisoner.

J. G. Phillimore, for the prisoner, submitted, with respect to the first count of the indictment, which charged an intent to murder, that, to support a count charging an intent to murder, the jury must be satisfied that a positive intention to murder existed in the mind of the prisoner at the time of the commission of the offence; and that it was not enough that the offence would have been murder if death had ensued.

PATTESON, J., (in summing up).—It is a very important question, whether, on a count charging an intent to murder, it is essential that the jury should be satisfied that that intent existed in the mind of the prisoner at the time of the offence, or whether it is sufficient that it would have been a case of murder if death had ensued;

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however, if it be necessary that the jury should be satisfied of the intent, I have no doubt that the circumstance, that it would have been a case of murder if death had ensued, would be of itself a good ground from which the jury might infer the intent, as every one must be taken to intend the necessary consequences of his own acts. In the present case, I think you may dismiss the first count from your consideration, as it would be very difficult to say, that if Mr. Vaughan had died, this would have been a case of murder (*a*). (On the other counts, his Lordship left the case to the jury, as a mere question of identity).

Verdict—Not guilty.

F. V. Lee, for the prosecution.

J. G. Phillimore, for the prisoner.

[Attornies—*Harper & Jones*, and *Asterley*.]

(*a*) In the case of *Reg.* v. *Cruse*, ante, Vol. 8, p. 541, which was an indictment against husband and wife, on the stat. 1 Vict. c. 85, s. 2, for inflicting an injury dangerous to life, *with intent to murder*, Mr. Justice *Patteson* said, "Before you can find the prisoner, Thomas Cruse, guilty of this felony, you must be satisfied that when he inflicted this violence on the child he had in his mind a positive intention of murdering that child. Even if he did it under circumstances which would have amounted to murder if death had ensued, that will not be sufficient unless he actually intended to commit murder." So in the case of *Reg.* v. *Hill*, ante, Vol. 8, p. 274, which was a case of uttering a forged bill of exchange, Baron *Alderson* said, "A man must be taken to intend the consequences of his own acts, and must intend to defraud if he pays another a false note instead of a real one;" and the fifteen Judges held that the direction of the learned Baron was right. In the case of *Reg.* v. *Beard*, ante, Vol. 8, p. 143, which was a case of uttering a forged acceptance on a bill of exchange, Mr. Justice *Coleridge* said, "As to the intent, I must tell you, that every man is taken to intend the natural consequences of his own act;" and in the case of *Reg.* v. *Cooke*, ante, Vol. 8, p. 582, which was also a case of uttering a forged acceptance, Mr. Justice *Patteson* said, "If the prisoner, at the time he uttered this bill, knew that the acceptance was forged, and meant the bill to be taken as a bill with a genuine acceptance upon it, the inevitable conclusion is, that he intended to defraud. That was the opinion of the Judges in a late case [the case of *Reg.* v. *Hill*], reserved for their consideration."

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HEREFORD ASSIZES.

(*Civil Side.*)

BEFORE MR. JUSTICE PATTESON.

DELAMOTTE *v.* LANE.

In an action for a quarter's salary, for taking away a child from a school without a quarter's notice, evidence was given on the part of the plaintiff, that a prospectus was given to the defendant when he came to inquire the terms of the school, and that it was usual to send a prospectus of the terms of the school with each child who went home for the holidays; and it was proposed, on the part of the defendant, to call a witness to prove that she had taken her children from the plaintiff's school without notice, and without being called on for the quarter's salary:—*Held*, that this evidence was not admissible; but that the witness might be asked, whether she had ever received any prospectus when her children came home for the holidays.

ASSUMPSIT by the plaintiff, who was a schoolmistress, to recover a quarter's salary for taking away the defendant's children without giving a quarter's notice.—Plea, non assumpsit.

The plaintiff, in order to prove that the terms of the school were known to the defendant, gave evidence that a prospectus had been given to him when he called to inquire the terms of the school; and that it was usual to send a prospectus of the terms of the school with each child who went home for the holidays. On the part of the defendant, a witness was called, by whose evidence it was proposed to prove that *she* had taken away *her* children without notice, and without being called upon to pay the quarter's salary.

Talfourd, Serjt.—I submit that this is not evidence.

Ludlow, Serjt.—I put it, that it is evidence to shew that the plaintiff did not contract *generally* in the way in which she says she did.

PATTESON, J.—I think the evidence is not admissible;

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but you may shew that the witness never received any prospectus; because that goes to shew that the usual course was not such as is set up on the part of the plaintiff.

The witness then stated that she had never received any prospectus.

Verdict for the plaintiff.

Talfourd, Serjt., *R. V. Richards*, and *W. H. Cooke*, for the plaintiff.

Ludlow, Serjt., and *Greaves*, for the defendant.

[Attornies—*Sill* and *Gough*.]

WHEELER *v.* WHITING.

A. telling a policeman to take charge of B., is the same as his telling the policeman to take B. into custody, and is sufficient to support an action for false imprisonment by B. against A.

Semble, that in an action for false imprisonment, a plea that the defendant was possessed of a house, and that the plaintiff was there making a great disturbance, and refused to depart when requested, and was in great heat and fury, ready and desirous to make an affray, and cause a breach of the peace, whereupon the defendant gave the plaintiff into custody, is bad.

ASSAULT and false imprisonment.—Pleas, 1st, to the whole declaration, not guilty; 2nd, as to the assault and battery, that the defendant was possessed of a house, and that the plaintiff made a disturbance there, and refused to depart when requested so to do, wherefore the defendant laid hands on him and put him out; 3rd, as to the assault and battery and part of the imprisonment, that the defendant was possessed of a house, and that the plaintiff was and continued in it making a great noise and disturbance, and refused to depart when requested so to do, "and was then in great heat and fury, ready and desirous to make an affray, and cause and commit a breach of the peace there, whereupon the defendant, in order to prevent such affray and preserve the peace, and restore good order and tranquillity in his said house, gave charge of the plaintiff to William Evans, then being a policeman and police constable of the town of Monmouth, and then requested

the said W. E. to take the said plaintiff into his custody, to be dealt with according to law; and the said W. E. then being such policeman and police officer as aforesaid, then having view of such conduct and behaviour, and heat and fury of the plaintiff as aforesaid, then gently laid his hands on the plaintiff, and did then take the plaintiff into his custody," &c.

On the part of the plaintiff, William Evans was called: he said, "I am a policeman at Monmouth; the defendant keeps the Beaufort Arms Hotel; on the 3rd of October, between eight and nine in the evening, Thomas Jones, the boots at the Beaufort Arms, came to fetch me; in the hall of the Beaufort Arms I found the plaintiff and defendant, and Mr. Lawrence; the defendant said, 'Policeman, take that man in charge,' pointing to the plaintiff; I said I thought I could not do so, as I had not seen him do anything; the plaintiff was claiming a debt from Mr. Lawrence, and said he would expose him; Mr. Lawrence was going up stairs, and the plaintiff followed him and said he would follow him into every room in the house; the defendant said, 'Policeman, do your duty;' Mr. Lawrence and the plaintiff had gone up the stairs about five steps, when boots pulled the plaintiff by the skirts of his coat, and got him down into the hall again; I said, 'If I take him I must claim assistance,' and the defendant ordered boots to assist me; boots and I took the plaintiff to the station-house, and I locked him in; the defendant afterwards said that the plaintiff had been knocking up a great row at his house, but if it was guaranteed that he would not disturb his house, he should be liberated; I then went to the station-house and let the plaintiff go; the plaintiff had been there thirty or thirty-five minutes."

Ludlow, Serjt., for the defendant, in addressing the jury, submitted, that, with respect to the turning the plaintiff

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out of the house, the defendant was justified in doing it, as the plaintiff was making a disturbance, and would not depart when requested to do so; and, with respect to the imprisonment, he stated that it had not been ordered by the defendant, and even if it had, the defendant would be justified, as it would be shewn that the plaintiff was desirous of making an affray in view of the police officer, and was therefore given in charge.

For the defendant, Mr. Lawrence was called: he said, "I was dining at the Beaufort Arms on the 3rd of October; it was the second race day; I received a note and a message from the plaintiff; I went down stairs, and said that if he would speak to me, we had better walk into another room; he said there was no need of that; we went into a room and he said, 'Do you mean to pay me for those empty sacks?' I said I did not owe for any, and referred him to Messrs. Sparkes and Bruffham, to whom I had let my mill; he said, 'I look to you;' I said, 'If you think you have a right against me, you can bring an action if you choose;' he said he would have the money before he left the room; he said this in a loud tone, and I said, 'Mr. Wheeler, you are conducting yourself like a blackguard;' 'Blackguard!' he replied in a loud voice, 'damn your eyes, I'll knock you down;' he held his fist over my head; he said I should not leave the room till I paid him; however, he let me pass him, and said, 'Very well, I will go with you, if you go to hell;' I was proceeding up stairs, and not wishing for a disturbance, I said to Mrs. Whiting, who was at the bar door, 'I appeal to you for protection;' the plaintiff then said, 'I will go and shew you up before your grand friends, I don't care a damn for you nor them either;' I begged the servants who were there to send for a policeman; the defendant then came in at the front door, and asked what was the matter? I said, 'Mr. Wheeler is making a disturbance, and I appeal to you for protection;' the defendant said to the plaintiff,

'You must not make a disturbance, and you must not go up stairs;' the plaintiff said he would, and that I was a swindler and a robber, and he held his fist over me; the defendant said, 'You shall not go up stairs, Mr. Wheeler;' and the plaintiff replied, 'I will go into every room in your house in defiance of you;' the policeman then came in, and I desired him to take the plaintiff in charge; a scuffle ensued, and the defendant said, 'If you don't go out of the house peaceably, I will turn you out,' and the defendant then ordered the policeman to do his duty; he said, 'Do your duty, I won't have a disturbance in this house;' the plaintiff was then taken from the house; the high sheriff, Sir Benjamin Hall, and the principal men of the county were dining up stairs; the defendant did not order the plaintiff to be taken to the station-house, and I never knew that he had been taken there till about a week ago; I do not consider that I owe the plaintiff anything, but he has brought an action against me."

PATTESON, J., (in summing up).—I think that the third plea is not good, and I certainly never saw such a plea before. The landlord of an inn or a public-house, or the occupier of a private house, whenever a person conducts himself as the plaintiff did, (even according to the evidence of his own witness), is justified in telling him to leave the house, and if he will not do so, he is justified in putting him out by force, and may call in his servants to assist him in so doing. He might also authorize a policeman to do it, but it would be no part of a policeman's duty as such, unless the party had committed some offence punishable by law. But, although it would be no part of a policeman's duty to do this, it might be better in many cases that a policeman should assist the owner of the house in a matter of this kind, as he would probably get the person out of the house with less disturbance than the owner himself could do. I think that the defendant was quite justified in having the plaintiff turned out of the house;

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but to give him in charge to a policeman "to be dealt with according to law," is a very different thing. Telling a policeman to take charge of him is the same as telling the policeman to keep him in custody. Now as to the imprisonment, the defendant pleads that the plaintiff was making a disturbance in the house, and ready and desirous to commit a breach of the peace, whereupon he gave him in charge to the policeman, to be dealt with according to law; the policeman, however, was not justified in taking him, unless he saw some breach of the peace committed: on a charge of felony it would be different. There are several questions in this case:— 1st. Did the defendant cause the plaintiff to be assaulted and turned out of the house? it is plain that he did; 2nd. Was the plaintiff conducting himself in an improper manner and disturbing the quiet of the house, and did the defendant desire him to leave, and on his refusal to do so put him out? On this question it is proved by the plaintiff's own witness that the plaintiff was so conducting himself, for even if the plaintiff had been ill used by Mr. Lawrence, he was not justified in saying he would follow him into every room in the house, and if he did so say, the landlord had a right to tell him to leave the house and insist on his doing so. Then, did the defendant request the plaintiff to depart before force was used? It is essential to the defence that that should be shewn, for although a person be in the house of another and misconducting himself, the owner has no right to turn him out by force, without first requesting him to depart. With respect to the imprisonment, you will consider whether the defendant ordered the policeman to take the plaintiff. The policeman says he did, but it is said on the other side that the defendant did not tell the policeman to take the plaintiff to the station-house. That may be; but if you give a person in charge to a policeman, you do not tell the policeman what he is to do with him; and you will also consider whether the plaintiff was intending to commit a breach of the peace, as

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stated in the last plea. I think that that plea is not good in point of law, but as the plaintiff has taken no objection to it in point of law, but has denied it to be true in point of fact, I shall take your opinion upon it in point of fact, leaving the Court of Queen's Bench to deal with it hereafter.

Verdict for the plaintiff on the general issue, and on the 3rd plea with £5 damages, and for the defendant on the 2nd plea (*a*).

C. Phillips and *Greaves*, for the plaintiff.

Ludlow, Serjt., and *Whateley*, for the defendant.

[Attornies—*E. Pritchard* and *T. A. Williams*.]

(*a*) See the cases of *Moriarty* v. *Brooks*, ante, Vol. 6, p. 684, and *Howell* v. *Jackson*, Id. p. 723.

(*Crown Side.*)

BEFORE MR. BARON GURNEY.

REGINA *v.* NICHOLLS.

If a prisoner be indicted for any felony which includes an assault, he may be convicted of the assault, if the indictment contain any one good count, although all the other counts may be bad.

On a charge of feloniously cutting with intent to do grievous bodily harm, it is immaterial whether, if death had ensued, the crime would have been murder or manslaughter.

CUTTING.—The 1st count of the indictment charged the prisoner with cutting with intent to maim.

2nd, to disfigure; 3rd, to disable; 4th, to do some grievous bodily harm.

It appeared that the prosecutor having interfered to pre-

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vent the prisoner and another boy from fighting, the prisoner stabbed the prosecutor.

Greaves, in addressing the jury, submitted, that although it might have been the intention of the legislature to make stabbing an offence, where, if death had ensued, the crime would only have been manslaughter, still they had not carried their intent into effect, for as the word "maliciously" was in the new enactment, it must still appear that it would have been a case of murder if the party had died; and he referred to the cases decided on the Coventry act, (22 & 23 Car. 2, c. 21), as authorities to shew that the offence was still the same under the 9 Geo. 4, c. 31. He submitted, also, that at all events there was no evidence to prove the first three counts.

GURNEY, B., left the case to the jury upon the last count of the indictment, and said, "I am clearly of opinion that the act applies to all cases, whether, if death had ensued, it would have been murder or manslaughter. It was the very object of the legislature that it should do so, and all the Judges are of opinion that it does" (*a*).

The Jury found the prisoner guilty of an assault.

Greaves then moved in arrest of judgment, and submitted that the last count was clearly bad, and being so, no judgment could be given upon it for the assault.

GURNEY, B.—If there is any one count good, and there is an acquittal upon all, still judgment may be given for an assault. If the record were drawn up, there would be no error on the face of it.

Greaves.—My point is, that there would—for that if the

(*a*) See the case of *Reg.* v. *Griffiths*, ante, Vol. 8. p. 248.

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record were drawn up, it would state that the jury found that the prisoner was not guilty altogether on the first three counts, and not guilty of maliciously cutting, but guilty of an assault on the last count; and then, if the last count was bad, judgment would be reversed on error. It is just like the case of burglary, where the jury acquit of the burglary, but find guilty of larceny; and then, if the count be bad, no judgment can be given for the larceny.

GURNEY, B.—I am clearly of opinion the objection is not valid.

Sentence was passed on the prisoner for the assault (*a*).

Lee Warner, for the prosecution.

Greaves, for the prisoner.

[Attornies— ——— and *E. Pritchard.*]

(*a*) It is worthy of observation, that in the stat. 1 Vict. c. 85, the different sections vary with respect to the words "unlawfully and maliciously;" s. 2, omits both "unlawfully" and "maliciously;" s. 3, also omits these words; s. 4, has them in the beginning of the clause, but omits them before the word "stab." They occur in s. 5, and the word "maliciously" is omitted in s. 6. If the different wording of the clauses is to have any different effect, the point might still arise in the case of shooting with intent to maim, &c., under s. 4.

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MONMOUTH ASSIZES.

(*Civil Side.*)

BEFORE MR. BARON GURNEY.

EVANS *v.* PHILLPOTTS, Gent., one &c.

A., an attorney, caused B. to be subpœnaed as a witness in a cause in which A. was attorney, and B., before he went to the Assizes, asked A. who was to pay him? and A. said he would do so. After the Assizes, at which B. attended and was examined, A.'s clerk, by the direction of A., gave B. an I O U for the amount of B.'s expenses and loss of time, which amount A. received from the opposite party after the costs in the cause had been taxed:—*Held*, that B. might recover the amount from A. on a declaration containing counts for money had and received, and on an account stated.

DEBT for money had and received, with a count upon an account stated. Pleas—1st, nunquam indebitatus; and 2nd, to 15*l.* 3*s.*, parcel of the debt, payment.

It was opened by *Talfourd*, Serjt., for the plaintiff, that the plaintiff was a master tailor carrying on business at Newport, the defendant being an attorney in the same town, and that the present action was brought to recover the sum of 15*l.* 3*s.*, for the plaintiff's journey and attendance as a witness in a cause of "Barnard *v.* Jones," which was tried at the Kent Summer Assizes of 1838. Mr. Frankis, the original attorney for the defendant in that cause, had died, and it being material to prove that the John Jones who was sued was not the John Jones who had given the bill on which the action was brought, the present plaintiff was subpœnaed by the defendant (who had succeeded to the business of Mr. Frankis) to prove that fact, and the defendant had promised to pay the plaintiff, and had been allowed the amount on taxation of costs against the opposite party, the jury having given a verdict

An I O U, which contains special terms that the sum to be paid shall be reduced in a certain event, and that part of the sum shall be disposed of in a particular manner, will require an agreement stamp, unless it relate to an amount under £20.

for Mr. Jones, the defendant, at Maidstone, they being satisfied that the wrong person had been sued.

On the part of the plaintiff, Mr. W. Thomas Townsend, a late clerk of the defendant was called. He said: "I am an accountant at Newport. The late Mr. Frankis was an attorney; I was clerk to him; at the time of his death there was a cause in the office of 'John Jones at the suit of Messrs. Barnard;' I know the defendant, who is an attorney; I introduced him to the late Mr. Frankis's clients; the subpœna is filled up as far as the names by me; the rest of the filling up is in the handwriting of Mr. Nicholls, of London, who was the agent of Mr. Frankis, and now of the defendant; an indorsement on it is by Mr. Phillpotts. [It was in these terms:—" 3rd August, 1838. Served W. A. Townsend personally, by J. G. Phillpotts, jun."] I served this subpœna on the plaintiff, who is a tailor and draper at Newport; I was then Mr. Phillpotts' managing clerk; I served it by his direction. [The subpœna was read. It was a subpœna commanding the present plaintiff to attend the Kent Assizes at Maidstone as a witness for the defendant in a cause of "Edward and William Barnard against John Jones."] The defendant, Mr. Phillpotts, was attorney for Jones; the plaintiff came to my residence on the 3rd of August, when Mr. Phillpotts was present; the plaintiff declined to go to Maidstone unless he was satisfied who was to pay his expenses; Mr. Phillpotts said he would pay him every thing that was fair and reasonable; the plaintiff said he would not go so far without money, or knowing who was to pay him; Mr. Phillpotts saw the plaintiff, myself, and Mr. Jones off by the packet to Bristol; the plaintiff said he could disprove the signature to the bill on which Messrs. Barnard sued; the plaintiff was told by Mr. Phillpotts that he would be entitled to his mileage, but no back carriage, and that it was not certain whether it would be 15*s*. or a guinea a day, and a shilling a mile; the

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plaintiff said he should be satisfied; as we took leave of the defendant on board the packet, the defendant said that as soon as we came back the plaintiff should be paid his mileage and the guinea a day if he could get it allowed; the plaintiff and myself were examined as witnesses at Maidstone, and the verdict was in favour of the defendant, Mr. Jones; in September the plaintiff applied to Mr. Phillpotts and me, and wished to be paid; Mr. Phillpotts asked him what he supposed he was going to get; the plaintiff said a guinea a day and his mileage; the defendant said he would give him all that was allowed. This paper was written by me; Mr. Phillpotts was present; I wrote it by his dictation; the part down to the signature was written first, in the presence and at the request of Mr. Phillpotts; we were all three drinking gin and water together; the residue of the writing was written down half an hour after; the plaintiff had borrowed a sovereign of me on going to Maidstone; the residue of the writing was added in Mr. Phillpotts' presence."

Talfourd, Serjt., proposed to give the paper in evidence. It was as follows:—

"3rd Sept., 1838.

"*Jones* ats. *Barnard*.

	£	s.	d.
"Daniel Evans's mileage 184 - - -	9	4	0
"Eight days' time (master-tailor at 15*s*.) -	6	0	0
	£15	4	0

"I O U fifteen pounds four, for self and Phillpotts.

"W. M. TOWNSEND."

"P. S. The above acknowledgment to be deemed as cash; but in case of taxation off, Daniel is to allow accordingly.

"Mr. Phillpotts to pay Townsend a sovereign out of the

above, as proposed, leaving 14*l.* 4*s.*; and the odd four bob to be spent among us three."

Ludlow, Serjt., for the defendant.—I submit that the paper is not receivable in evidence without a stamp. It has been held that a mere I O U does not require a stamp, as it is a mere admission of a debt. But this is a great deal more than a mere admission of a debt.

Talfourd, Serjt.—Even if it be an agreement, it relates to a sum under £20, and therefore would not require a stamp.

Ludlow, Serjt.—That would be so if it was an agreement; but I submit that it requires a promissory-note stamp.

GURNEY, B.—I think it is not a promissory note. I think it may be an agreement; but it is under £20 value.

The paper was received in evidence.

Mr. Townsend further said: "Mr. Phillpotts told me that he had received the money from the other side. This paper [a paper asked for by Mr. Serjt. *Talfourd*, and produced by Mr. Serjt. *Ludlow*] is the bill of costs, and the sums disallowed by the Master are on it. A sum of 15*l.* 3*s.* is charged for the plaintiff's attendance, and no part of it disallowed."

The bill of costs taxed by the Master was put in.

Ludlow, Serjt., for the defendant, submitted, that, in point of law, the attorney of a party was not personally liable to pay the witnesses whom he subpœnaed, the party for whom they were subpœnaed being the person liable; and

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that even if Mr. Phillpotts had received the costs from the opposite attorney, it was his duty to give credit for the whole amount of them to his own client, Mr. Jones; and that there was no privity of contract between the present plaintiff and the present defendant.

GURNEY, B., (in summing up).—The plaintiff was not bound to go to Maidstone, in obedience to the subpœna, unless he was first paid his expenses; and it appears upon the evidence that before he started the present defendant undertook to pay him; and it also appears that the defendant has received it. That being so, the plaintiff is entiled to recover in this action.

Ludlow, Serjt.—Will your Lordship allow me to ask, whether you have ruled that there was a privity of contract between the plaintiff and defendant?

GURNEY, B.—Yes; I think there was privity between them.

Verdict for the plaintiff for 15*l.* 3*s.*

Talfourd, Serjt., and *F. V. Lee*, for the plaintiff.

Ludlow, Serjt., and *C. Phillips*, for the defendant.

[Attornies—*Webb & Clark*, and *J. Philpotts*.]

In the ensuing Term, *Ludlow*, Serjt., applied to the Court of Exchequer for a new trial, but the Court refused a rule.

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REGINA *v.* VINCENT, FROST, and EDWARDS.

CONSPIRACY.—The first count of the indictment charged, that, on the 1st of August, 1838, at Pontypool, the defendants, together with divers other evil-disposed persons, did conspire &c., "to excite discontent and disaffection in the minds of the liege subjects of her Majesty, and to excite the liege subjects of her Majesty to hatred and contempt of the government and constitution of this realm, and to unlawful and seditious opposition to such government." In this count four overt acts were charged, which were four meetings at which the defendants spoke, and violent language imputed to them was set out in stating these overt acts.

Second count, for a conspiracy to induce and procure divers large numbers of persons to assemble and meet together, for the purpose of exciting terror and alarm in the minds of the Queen's subjects, and by force of such terror and alarm to procure great changes to be made in the constitution of the realm as by law established, and to annoy, alarm, disturb, and prejudice divers subjects of the Queen in the peaceable enjoyment of their property. In this count no overt act was charged.

Third count, for an unlawful assembly.

It appeared that the three defendants had attended a series of Chartist meetings at Pontypool, and that at all of them speeches of a violent nature were delivered to large assemblies of persons.

On the part of the prosecution it was proposed to ask Mr. Roberts, the superintendant of police at Pontypool, who attended several of the meetings, whether persons complained to him of being alarmed by these meetings.

Carrington, for the defendant Edwards.—I submit that persons who were alarmed should be called to prove that fact, and that what they said to Mr. Roberts is not receivable.

On the trial of an indictment for a conspiracy to procure large numbers of persons to assemble, for the purpose of exciting terror in the minds of her Majesty's subjects, evidence was given of several meetings at which the defendants were present, and it was proposed to ask a witness, who was a superintendant of police, whether persons complained to him of being alarmed by these meetings:—*Held*, that the evidence was receivable, and that it was not necessary to call the persons who made the complaints.

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GURNEY, B.—The fact that persons made complaint to the superintendant of police of alarm occasioned by these meetings is receivable.

The evidence was received; and Mr. Roberts stated that several persons came to him, and complained that they were alarmed by these meetings, and requested him to send for military assistance.

The jury found the defendants Vincent and Edwards guilty (*a*).

Talfourd, Serjt., *R. V. Richards*, and *Whateley*, for the prosecution.

Carrington, for the defendant Edwards.

The defendant Vincent in person.

[Attornies—*T. J. Phillips*, and *Owen*.]

See the case of *Regina* v. *Vincent*, ante, p. 91, and *Regina* v. *Shellard*, post, p. 277.

(*a*) Frost was not tried, as he had been found guilty of high treason at the Monmouth Special Commission, ante, p. 129. This indictment had been found at the Summer Assizes, 1839, and was removed by certiorari, and now tried at Nisi Prius by a special jury.

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(*Crown Side.*)

BEFORE MR. JUSTICE PATTESON.

REGINA *v.* SHELLARD.

MISDEMEANOUR.—The indictment in this case had been found at the Monmouth Special Commission, when the defendant had pleaded not guilty, and had traversed and entered into recognisances to try at the present assizes, and the indictment was certified by Mr. Bellamy, the clerk of the Crown of the Special Commission, to the Judges of the assizes.

The first count of the indictment charged, that the defendant, on the 1st of October, 1839, and on divers other days and times, at Pontypool, "did conspire, confederate, combine, and agree, together with William Jones, and divers other evil-disposed persons, to the jurors aforesaid unknown, to raise and make insurrections, riots, routs, and seditious and unlawful assemblies within this realm, and to obstruct the laws and government of this realm, and to oppose and prevent their due execution, and to procure and obtain arms for the more effectual carrying into effect their said conspiracy, confederacy, &c.; and in furtherance of the said conspiracy, confederacy, &c., the said W. S. during the time aforesaid, to wit, on the 3rd day of November, in the year aforesaid, with force and arms, to wit, at &c., together with the said W. J., and divers other persons,

A. was charged with having conspired with W. J. and others unknown, to raise insurrection and obstruct the laws. It was proved that A. and W. J. were members of a Chartist lodge, and that A. and W. J. were at the house of the latter on a certain day, on the evening of which A. directed people assembled at the house of W. J. to go to the race-course at P., whither W. J. and other persons had gone:—*Held*, that on the trial of A., evidence was receivable that W. J. had, at an earlier part of the same day, directed other persons to go to the race-course; and it being proved that W. J. and an armed party of the persons assembled went from the race-course to the New Inn, it was held, that evidence might be given of what W. J. said at the New Inn, it being all one transaction.

If it be shewn that depositions were regularly returned by the magistrate to the proper officer, and it be proved by the latter that they cannot be found, after diligent search, the prisoner's counsel may cross-examine from copies of them, those copies being proved to be correct by the magistrate's clerk.

A prisoner's counsel has no right to ask a witness for the prosecution, whether he has *always* told the same story; the question ought to be—"Have you always said so except before the magistrates?"

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to the said jurors unknown, to the number of 2000 and more, unlawfully, seditiously, riotously, and routously did assemble and meet together, armed with guns, &c., and remained and continued so unlawfully and seditiously assembled and met together, armed as aforesaid, for a long space of time, to wit, for the space of forty-eight hours then next following; and during that time made a great riot, rout, and unlawful assembly, and, during the time last aforesaid, attacked and broke open divers dwelling-houses of divers liege subjects of our said lady the Queen, in the county aforesaid, and beat, bruised, wounded, and ill-treated divers of the liege subjects of our said lady the Queen, then and there being in the county aforesaid, and seized and took from the said last-mentioned subjects and other subjects of our said lady the Queen, then and there being in the county aforesaid, divers quantities of arms, to wit, 100 guns, &c., and therewith then and there unlawfully and seditiously armed themselves, against the peace, &c."

The second count charged, that the defendant, together with the said W. J. and the said other evil-disposed persons, did conspire, &c., "to raise and make insurrections, tumults, riots, routs, and unlawful assemblies within this realm, and to obstruct the due execution of the laws and government within this realm." In this count no overt act was charged.

The third count was for a riot.

It was proved that the defendant had been a member of the Chartist Association, and that Jones, the clock-maker, (who was convicted of high treason at the Monmouth Special Commission), was also a member, and that on the 3rd of November, 1839, in the evening, the defendant had been at Jones's house, which was a beer-house at Ponty-pool, and was heard to direct the people there assembled to go to the race-course, where Jones had gone on before with others. It was then proposed to prove a direction given by Jones in the forenoon of the same day.

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F. V. Lee, for the defendant, objected that there was not sufficient to connect the defendant and Jones together.

PATTESON, J.—I think there is, as to any direction respecting the race-course.

The witness then proved that Jones had directed certain parties to meet on the race-course; and the same witness also proved that he went to the race-course, where a number of persons were assembled, having arms, and that he went thence to the New Inn, which was on the road towards Newport from the race-course. It was proposed to prove what Jones said at the New Inn.

F. V. Lee and *Keating* objected that at all events any declaration should be confined to the race-course.

PATTESON, J.—I think the evidence admissible, as it is all part of the same transaction.

It was proposed to cross-examine a witness for the prosecution as to what he said before the magistrates. Mr. Bellamy, the clerk of assize, and who was also clerk of the Crown at the Monmouth Special Commission, proved that at the Special Commission the depositions of the witnesses taken before the magistrates had been frequently produced, and that they had been mislaid, and that diligent search had been made several times for them, and they could not be found; and that he had inquired for them since from Mr. Maule, the Solicitor of the Treasury, and could not get them. Mr. Edwards, the clerk of the magistrates, proved that depositions were regularly taken and returned, and that a copy produced by the prisoner's attorney was a correct copy.

PATTESON, J.—I think the copy of the witness's deposition may be read.

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The witness had been asked whether he had always told the same story.

PATTESON, J.—That is an irregular question. I have constantly said, and always mean to say, that is an irregular question, because it includes the time before the magistrates as well as other times. The question ought to be—Have you always said so except before the magistrates (*a*)?

Verdict—Guilty.

Ludlow, Serjt., and *Whateley*, for the prosecution.

F. V. Lee and *Keating*, for the defence.

[Attornies—*Edwards*, and *Owen*.]

(*a*) See the case of *Regina* v. *Holden*, ante, Vol. 8, p. 606.

GLOUCESTER ASSIZES.

(*Crown Side.*)

BEFORE MR. BARON GURNEY.

REGINA *v.* PULHAM, SMITH, WASLEY, THOMAS, and WHITE.

Three persons were charged with a larceny, and two others as accessaries, in separately receiving portions of the stolen goods. The indictment also contained two other counts, one of them charging each of the receivers separately with a substantive felony in separately receiving a portion of the stolen goods. The principals were acquitted:—*Held*, that the receivers might be convicted on the last two counts of the indictment.

LARCENY.—The indictment charged the first three prisoners with stealing a carpet-bag and a number of articles

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therein contained, the property of John Davenport, and charged the last two prisoners, Thomas and White, with receiving *separately* certain of the goods so stolen as aforesaid; and there were also two counts, one of them charging each of the last-mentioned prisoners with a substantive felony in *separately* receiving portions of the same goods.

The jury acquitted the three principals, but found the two receivers guilty on the last two counts.

Keating, for the prisoner Thomas, moved in arrest of judgment.—The principals being acquitted, the accessaries cannot have judgment given against them; whatever might be the case if the receivers had been separately indicted, upon this indictment they cannot receive judgment, as all the principals have been acquitted. It is quite clear that a larceny committed by another person could not have been given in evidence upon the trial of this indictment, for that would be trying two felonies on the same indictment; and although it has been held, that a count for a substantive felony may be joined in the way in which these counts are in this indictment (*a*), still the receiving must be the receiving of stolen goods of which the principals were the stealers. The ordinary form of the count against a receiver used to allege the receiving to be *from* the principal, and the substantive count is introduced to prevent an acquittal, if it should turn out that the receipt was not from the principal but from some other person, but still the principal must be proved to have committed the felony.

GURNEY, B.—I do not think the objection ought to

(*a*) See the cases of *Rex* v. *Wheeler*, 7 C. & P. 171; *Rex* v. *Hartall*, 7 C. & P. 475; *Rex* v. *Austin*, 7 C. & P. 796; and the case of *Regina* v. *Caspar*, post, 289.

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prevail. I am quite satisfied there is nothing to prevent judgment being given against the receivers.

They were sentenced accordingly.

W. J. Alexander, for the prosecution.

C. Watson, for the prisoner Pelham.

Greaves, for the prisoner Smith.

Keating, for the prisoner Thomas.

[Attornies—*Straford*, and *Browne*.]

REGINA *v.* WHITE.

A forged paper, in the following form,—"Please let the lad have a hat, and I will answer for the money. E. B.," is a forged request for the delivery of goods, and is not the less so because it may also be a forged undertaking for the payment of money.

FORGERY.—The prisoner was indicted for forging and uttering "a certain forged request for the delivery of goods," which was as follows:—

"Mr. Turner,—Please to let the lad have a hat about 9*s*., and I will answer for the money.

"ED. BARRETT."

Greaves, for the prisoners.—I submit that this is not a request for the delivery of goods. It is a guarantee for the payment of the price, and if it be the subject of forgery at all, it should have been charged to be an undertaking for the payment of money under sect. 3 of the stat. 1 Will. 4, c. 66. In the case of *Reg.* v. *Reed* (*a*), it was held that a conditional undertaking for the payment of money came within that section of the statute. And if this

(*a*) Ante, Vol. 8, p. 623.

be an undertaking for the payment of money, and comes within another enactment of the statute, the prisoner cannot be convicted on the present indictment. In the case of *Rex* v. *Puddifoot* (*a*), it was held that an indictment under the stat. 7 & 8 Geo. 4, c. 29, s. 25, for stealing a *sheep*, was not supported by proof of stealing a *ewe*, because the statute specifies both *ewe* and *sheep*. So in the case of *Rex* v. *Horwell* (*b*), it was held, that an indictment for uttering a forged bill of exchange was not supported by proof of the uttering of a bill of which the acceptance only was forged. In the stat. 1 Will. 4, c. 66, the word "request" seems to have been introduced to meet cases in which the instrument did not amount to an order, but the juxtaposition of the words "warrant, order, or request," shews that the word "request," which is for the first time used, applies to cases similar to those of "warrant and order."

GURNEY, B.—I think that this instrument is not the less a request for the delivery of goods because it may be also an undertaking for the payment of money.

Verdict—Guilty.

W. J. Alexander, for the prosecution.

Greaves, for the prisoner.

[Attornies—*Straford & Cox*, and *Browne*.]

(*a*) R. & M. C. C. 247. (*b*) Id. 405.

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REGINA *v.* TRENFIELD.

A. was indicted at the assizes for perjury, he had neither been in custody nor on bail. After the bill was found, A.'s counsel applied to have the case tried at the same assizes at which the bill was found. The counsel for the prosecution objected, and stated that no notice had been given by the defendant to the prosecutor of his intention to try at these assizes, except the present application:—*Held*, that the prosecutor could not be compelled to try at these assizes, and the case therefore stood over to the next assizes.

PERJURY.—A true bill was found against the defendant at these assizes for perjury. The defendant had neither been in custody nor on bail.

W. J. Alexander, for the defendant, applied to the learned Baron to have the case tried at these assizes.

F. V. Lee, for the prosecution.—I submit that the prosecutor cannot be compelled to try the case at these assizes. Before the stat. 60 Geo. 3 & 1 Geo. 4, c. 4, s. 3, a case of misdemeanour, where the defendant was not in custody, could not be tried at the same assizes at which the indictment was found without the consent of the prosecutor, and that enactment applies only to cases where the defendant has been committed to custody, or has been on bail for twenty days. In the present case no notice has been given to the prosecutor of the defendant's intention to try at these assizes, except by the present application.

GURNEY, B.—This is a point of practice which is of some importance. I will confer with my Brother Patteson upon it.

On the following day his Lordship said, "I have conferred with my Brother Patteson, and we are of opinion that the prosecutor cannot be compelled to try at these assizes; the case must therefore stand over to the next assizes."

F. V. Lee, for the prosecution.

W. J. Alexander, for the defendant.

[Attornies—*W. H. King* and *Trenfield*.]

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(*Civil Side.*)

BEFORE MR. JUSTICE PATTESON.

REGINA *v.* THE INHABITANTS OF CHEDWORTH.

INDICTMENT preferred at the Gloucester Quarter Sessions for non-repair of a highway. The indictment was preferred under an order of four magistrates made in pursuance of the 94th section of the stat. 5 & 6 Will. 4, c. 50, and was removed by certiorari.

A complaint was made to magistrates, under the 94th sect. of the highway act, 5 & 6 Will. 4, c. 50, that a way alleged to be a highway was out of repair; the magistrates ordered an indictment against the inhabitants of the parish, which was found, and removed by certiorari, and on the trial of it the defendants were acquitted, on the ground that it was not a highway. The prosecutor applied for costs to be paid out of the highway rate, under the 95th section of the act. It was objected that this provision as to costs, only applied where the existence of a highway was not disputed, and also that it did not apply when the indictment was removed by certiorari. The Judge refused the order.

Semble, that the 95th sect. of the act as to payment of costs out of the highway rate, and the 98th sect. as to costs to be paid by any defendant where the defence is frivolous, are distinct in their operation, and are not to be connected.

Semble, that the magistrates are not bound to make their order in terms exactly following those contained in the information.

It appeared that the order of magistrates did not pursue the terms of the information in describing the road to be indicted; and it also appeared that it was admitted before the magistrates by the surveyor, that a part at each end of the road indicted was public road, but the surveyor denied that the portion of the road between those parts was so.

The Jury found the defendants not guilty, on the ground that it was not a highway.

R. V. Richards, for the prosecution, applied for an order for the costs to be paid out of the highway rate under the 95th section of the act.

Ludlow, Serjt., and *Greaves*, for the defendants, submitted that this case was not within the statute, which only applied where the publicity of the road was admitted, and

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where the only question was, who was liable to repair it, and that the word "highway" in the statute meant a public highway, which was not disputed. 2nd, That the justices had no jurisdiction to make the present order, because it did not follow the information, and as the surveyors could only be called on to answer the matters stated in the information and no others, the order must recite the information, and follow it; and as the order here was totally different from the information, it was therefore a nullity. 3rd, That the 95th section applied only to trials in the ordinary course, and not to cases removed by certiorari, and that this was not a trial before a Judge of Assize: and 4th, That the 95th section of the statute was to be construed with reference to the 98th, and merely meant that where the defence appeared to be frivolous the costs were to be paid out of the fund there mentioned.

R. V. Richards and *Gray*, for the prosecution, submitted, 1st, That the 95th section of the act was imperative, and applied to all cases in which the liability to repair was denied. 2nd, That as to the form of the order the only question was, whether it was good on the face of it. 3rd, That the words "Judge of the Assize" must be taken in their ordinary acceptation,and that, therefore, a Judge of Nisi Prius might order costs; and 4th, that the 95th and 98th sections were quite distinct in their operation, and could not be connected.

PATTESON, J.—I am not satisfied as to what the construction of this act ought to be; the words are very strong, and seem to be difficult to be got over; but to construe them as imperative will lead to great absurdity. With respect to the order I am inclined to think, that when the justices had the case before them they might make any order respecting it which they thought fit. As to connecting the 95th and 98th sections, I think that cannot be done,

as they are introduced into the statute for different purposes. I will take time to consider of the case.

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After taking time to consider, Mr. Justice Patteson refused to make any order for costs.

R. V. Richards and *Gray*, for the prosecution.

Ludlow, Serjt., and *Greaves*, for the defendant.

[Attornies—*Herbert* and *Bevir*.]

See the 94th, 95th, and 98th sections of the Highway Act, 5 & 6 Will. 4, c. 50, which are set out in Burn's Justice, Tit. Highways. The 98th section appears to apply to *all* defendants, whether parishes or private individuals, and under it *any* defendant is liable to costs, where the defence is "frivolous or vexatious." The 95th section gives costs to be paid out of the highway rate, and that is not by its terms limited to cases where the defence is frivolous or vexatious. See the case of *Reg.* v. *Yarkhill*, ante, p. 218.

The case of *Regina* v. *Inhabitants of Preston*, 2 M. & Rob. 137, (which seems to have gone on the 98th section), was an indictment preferred at the sessions by direction of the justices under the stat. 5 & 6 Will. 4, c. 50, s. 95, and the defendants had removed it by certiorari into the Queen's Bench. The defendants were found guilty, and *Cresswell*, for the prosecution, applied to *Alderson*, B., (who had tried the case), for an order on the defendants for costs, under the 98th section of the statute. "*Alderson*, B., expressed himself to be clearly of opinion, that the defence was 'frivolous and vexatious' within the meaning of the section cited, and a case in which, if the legislature had given him authority to do so, he should make an order on the defendants to pay the costs; but as the discretion over the costs was in terms given to the Court at which the indictment *was preferred*, and not to the Court before which it was tried, he entertained much doubt whether he could make the order;" and on the following morning his Lordship said he had examined the different provisions of the act of Parliament, and was of opinion, that he had not any authority over the costs, and the motion for costs was refused. This case was tried at York, at the Summer Assizes of 1838, and in a subsequent term an application for these costs was made in the Court of Queen's Bench, (reported 7 Dowl. P.C. 593); and, after argument, a rule for the payment of the costs was made absolute; Mr. Justice *Williams* being of opinion, on the authority of the case of *Rex* v. *Inhabitants of Upper Papworth*, (2 East, 413), that "the Court before whom such indictment shall be

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preferred," meant the Court of Queen's Bench, when the indictment was removed by certiorari. In that case the provisions of the 95th section as to costs do not appear to have been referred to. The case of *Regina* v. *Earl of Radnor* (in Q. B., May 12, 1840) was an application for a mandamus to magistrates, commanding them to *convict* the surveyors of the highways of a parish in a penalty not exceeding £5, for non-repair of a highway, and to order the repair of the road. It appeared that the magistrates had directed a surveyor to make a report on the state of the road, and that he made a report in writing that the road was out of repair, but that he was further orally examined by the magistrates, who refused to convict the surveyor or make any order. In support of the application it was contended, that if the justices appointed a viewer, they were bound by his report; and that if he reported the road to be out of repair, the office of the justices was merely ministerial, and they were *bound* to convict the surveyor in a penalty not exceeding £5, and to order the road to be repaired. Mr. Justice *Coleridge*, after observing, that the magistrates were called upon, not only to act ministerially in ordering the road to be repaired, but also to act ministerially in convicting the surveyor in a penalty, said, that the terms of the statute being in effect, that if it should appear to the magistrates that the road was out of repair, they should convict the surveyor; he could not but think that the magistrates were to exercise a discretion on the subject, and that the words "shall convict" would of themselves import a judicial act on the part of the magistrates; and the rule for the mandamus was discharged with costs.

CENTRAL CRIMINAL COURT.

JUNE SESSION, 1839.

BEFORE MR. JUSTICE LITTLEDALE.

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June 19*th*, 24*th*.

REGINA *v.* CASPAR and Others.

An indictment stated that *a certain evil-disposed person stole* certain goods; that L. C. *incited* him to do so; that E. C. did the same; that E. M. *received* a portion of the property knowing it to have been stolen; it also charged A. A. and the before-mentioned E. C. as receivers. All the prisoners having been found guilty by the jury, the conviction was held good against all except L. C. who was merely charged as accessary before the fact, and judgment was given upon the charges of receiving only.

THE first count of the indictment stated that *a certain evil-disposed person*, on the 25th of March, *stole* 102 pounds weight of gold-dust of the value of £5000, two wooden boxes of the value of 2*s*., and two tin boxes of the value of 2*s*., of the goods of James Hartley and others—against the peace, &c.

The second count stated that Lewin Caspar, *before the* said *felony* and larceny was done and committed, to wit, on the 10th of March, feloniously and maliciously did *incite*, move, procure, counsel, and command *the said evil-disposed person* to commit the said felony, against the form of the statute, &c.

The third count charged Ellis Caspar with being an *accessary before* the fact, and was similar in form to the second.

The fourth count stated that Emanuel Moses, on the 30th of March, *received* the said 102 pounds weight of gold-dust, value &c., of the goods &c., "before then feloniously stolen, taken, and carried away in manner and form aforesaid," well knowing them to have been stolen.

The fifth count contained a similar charge in a similar form against Isaac Isaacs (*a*), except that it stated him to

(*a*) This party was not in custody, and was not tried.

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have received the wooden boxes and the tin boxes as well as the gold-dust.

The sixth count charged Alice Abrahams with receiving all the articles mentioned in the indictment, and was similar in form to the fifth count.

The seventh count stated that *the said* Ellis Caspar (*a*), on the 30th of March, the said 102 pounds weight of gold-dust, &c., &c., before then feloniously stolen, taken, and carried away in manner and form aforesaid, feloniously did receive and have, he the said Ellis Caspar then and there well knowing the said goods and chattels to have been feloniously stolen, &c., against the statute, &c., &c.

There were seven other counts similar to the first seven, only stating the goods to be the property of George Hathorn; and there were fourteen other counts, which stated the property stolen to be gold instead of calling it gold-dust.

When *Clarkson*, for the prosecution, had stated the case to the jury,

Bompas, Serjt, who was counsel for Emanuel Moses, submitted that *Clarkson* ought to elect which of the prisoners he would proceed against.

Clarkson, contrà, contended that it was a case in which he was not bound to elect.

LITTLEDALE, J., was of opinion that it was a case of principal and accessaries, and that what were called the first seven counts of the indictment were substantially only one count against one principal and several accessaries, and, therefore, that the prosecutor was not bound to elect.

(*a*) This was the same person as in the third count was charged with being an accessary before the fact to the felony.

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The case proceeded, and a person named Henry Moss was called and examined, on the part of the prosecution, as the person who stole the gold-dust, or rather it was made a question for the jury, on the whole of the evidence, whether he or Lewin Caspar was the person who committed the robbery. His name was on the back of the indictment as a witness (*a*).

When the evidence for the prosecution had closed,

On the part of the defence, generally, it was contended that there was no case to go to the jury. The substance of the argument was as follows:—There are two ways of framing an indictment against an accessary—either by indicting the principal with the accessary, or if the accessary be indicted alone, you must either shew that the principal has been convicted, which you can only do by proving the record of his conviction, or you must shew that the principal has been outlawed. Moses is charged as an accessary after the fact by receiving the stolen goods, and as the prosecutor has not proved that the principal has been convicted, the accessary is entitled to an acquittal. The accessary cannot be convicted until the principal has either been convicted or outlawed. If the principal be attainted, and the attainder be reversed, the accessary escapes; and the same doctrine applies to cases where the principal and accessary are tried together. If the principal pleads not guilty, and the accessary does so also, then the trial of both shall go on, and the jury are to inquire first of the guilt of the principal, and if they find him guilty, then they are to inquire as to the accessary; but if both are found guilty, the judgment must be first given against the principal; for if anything obstruct judgment, as clergy, a pardon, &c., the accessary is to be discharged; and if the principal does

(*a*) There was also another indictment against Moss by name, charging him with stealing the property in question, and charging the other prisoners with the same parts of the transaction as in the present indictment.

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not plead not guilty, but pleads a plea in bar or in abatement, or autre fois acquit, the accessary shall not be put to answer till that plea be determined. When the guilt of the principal is averred, it can only be proved by the principal being tried with the accessary, or if he be not, then by the record of conviction or outlawry of the principal. This was the rule of the common law, and though receivers are not at common law accessaries after the fact merely as receivers, yet they are made so by the statute 3 & 4 Will. 3, c. 9, s. 4. And the statute 7 & 8 Geo. 4, c. 29, s. 54, confirms the old law as far as it relates to accessaries, though it also gives another mode of proceeding, viz. for a substantive felony. But here the indictment is not framed against the receivers as for a substantive felony under the statute, but it is in the form of an indictment against principal and accessary, and must be governed by the rules of the common law. The indictment is also bad as far as relates to the description of the principal, for it ought to have been in such a form as that the principal could be legally convicted upon it. There is no principal felon properly charged; no process could issue upon it to bring in any principal to be tried, nor could any principal surrender himself upon such an indictment to take his trial. It should have been so framed, in order to make it good against the accessaries, as that either the principal could be tried and convicted with them, or that the record of the conviction of the principal could be put in. The indictment is too uncertain for it to be good either against the principal or accessaries. The principal ought to be named in a case like the present. If the indictment had said that the goods were stolen by a certain person to the jurors unknown, that would not be supported if it turned out that he was known. The indictment ought to shew who stole the goods, for otherwise the accessaries do not know what is the felony against which they are to defend themselves. Supposing there were two indictments for the same offence, and there was an acquittal on the first, how could there be

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a plea of autre fois acquit to an indictment framed with such uncertainty? What evidence could the party acquitted give as to who was the evil-disposed person mentioned in the first indictment? The evil-disposed person might be John Thomas, or William Smith, or anybody else; and an indictment is bad to which you cannot plead autre fois acquit, or autre fois convict. There being two indictments in respect of this transaction, is a practical illustration of the extreme difficulty in which a prisoner is placed. It is true that these latter objections are rather upon the record. So far as Moses is concerned, it may be admitted that if the indictment had been for a substantive felony under the stat. 7 & 8 Geo. 4, c. 29, s. 54, merely for receiving the goods knowing them to have been stolen, it would not be necessary to state who stole the goods. But this indictment is not framed on the statute—it is an indictment against principal and accessaries, and not for a substantive felony. A substantive felony is a single felony against one or more individuals, whereas here there are five separate felonies, one of the prisoners being charged as accessary both before and after the fact. If it were a charge of a substantive felony, the prosecutor must elect against which of the prisoners and for which felony he would proceed. If it is a substantive felony, and not to be treated as an indictment against principal and accessary, then a great deal of evidence has been given against Moses and Abrahams which would not have been admissible if they had been separately tried for a substantive felony. Whether the prosecutor was compellable or not to make his election before the evidence was gone into, he is, at all events, now that it is closed, bound to elect against which of the prisoners singly the case shall be submitted to the jury.

C. Phillips, for Lewin and Ellis Caspar, in addition to the objections as to the charge of receiving, contended, that whatever might be the rule as to the necessity of naming the principal felon in the case of receivers, it was

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essentially necessary that he should be named in the case of accessaries before the fact; for otherwise it would be quite impossible for them to know against what felony they were to defend themselves, and that even in the case of a substantive felony, either against one person for a felony, or more than one person for a joint felony, the principal ought to be named.

Clarkson, *Bodkin*, and *Doane*, for the prosecution.—All the objections are on the record. We admit that there is no instance of such an indictment having ever been used before, but the circumstances of the case are of a novel description, and it became necessary to adopt a novel form of indictment, in order to meet them. This is not an indictment against principal and accessaries, but it is for a substantive felony, and is inquirable into as to accessaries before the fact, under the 7 Geo. 4, c. 64, s. 9, and as to receivers under 7 & 8 Geo. 4, c. 29, s. 54; and it is one entire transaction, though the parts are done at different times. It is composed of the stealing by Moss; of the seduction by the two Caspars, and of the receiving by Moses and his daughter Abrahams, and by Ellis Caspar; and the whole relates to the stealing and disposing of the property. There has been no decision as to what is meant by a substantive felony, but there is no authority to shew that this is not a substantive felony. There is no necessity to mention the name of the principal. Nor is there any necessity to prove any record of conviction, as no conviction is alleged, nor could any record of a conviction of an evil-disposed person be made up. It is sufficient to prove by parol evidence who stole the gold-dust, and the jury may decide upon his guilt just the same as if he had been put upon his trial with the accessaries. And, as to the difficulty alleged with respect to pleading autre fois acquit, or autre fois convict, there would be no difficulty in supporting such pleas, by introducing proper averments. There are many instances of separate felonies being in-

cluded in the same indictment, and tried as substantive felonies. The proper interpretation of the words substantive felony is, that it has reference only to the transaction itself, merely for the purpose of stating the offences themselves, which are to be the subject of inquiry; that is, the whole transaction or corpus delicti, and under the meaning of the expression substantive felony, you may have an indictment without naming the principal. This is not a case in which the prosecutor is bound, either before the evidence is gone into or after it has been given, to elect which of the prisoners singly he will proceed against, inasmuch as it is all one transaction. If the prisoners meant to say that there ought to have been a previous conviction of the principal, they should have objected to being put upon their trial before the principal was convicted.

LITTLEDALE, J., was of the same opinion after the case for the prosecution had been closed, as he was after it was opened, and before any evidence was given—viz. that upon an indictment framed like the present, the prosecutor was not bound to elect as to which of the prisoners singly the case should be submitted to the jury.

The case went to the jury as against all the prisoners, and the jury found them all guilty.

LITTLEDALE, J., reserved the whole of the objections for the opinion of the Judges, and the counsel for the prisoners were considered as having made in arrest of judgment such of them as were upon the record.

Clarkson, *Bodkin*, and *Doane*, for the prosecution.

Bompas, Serjt., *Adolphus*, *Prendergast*, *C. Phillips*, *Montagu Chambers*, and *C. C. Jones*, for the respective prisoners.

[Attornies—*W. C. Humphreys* and *Isaacs* and others.]

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Nov. 16th.

BEFORE LORD DENMAN, C. J.; TINDAL, C. J.; LORD ABINGER, C. B.; LITTLEDALE, J.; BOSANQUET, J.; PARKE, B.; PATTESON, J.; WILLIAMS, J.; GURNEY, B.; COLERIDGE, J.; COLTMAN, J.; MAULE, J.; ROLFE, B.

Bompas, Serjt., for the prisoners.—The proposition which it is necessary for me to support is, that this is an indictment against principal and accessaries, and the consequence is, that unless the principal be convicted, the accessaries are entitled to be discharged. The learned Judge at the trial said that he thought it was an indictment against principal and accessaries, or he would have required the prosecutor to elect. It is of material consequence to a prisoner whether he is tried on an indictment as against principal and accessary, or as for a substantive felony; because in the latter case he would have the right to call on the prosecutor to elect, which would get rid of the effect of some evidence, and prevent the giving of other evidence by the rules of law.

Lord ABINGER, C. B.—Being an accessary, by the modern statute, he is subject to an indictment without the principal, and yet it would be the same offence.

Bompas, Serjt.—The form of the indictment is clearly an indictment against the prisoners as accessaries. There was also another indictment naming the principal, and in the indictment in question the parties are indicted for different offences; by the 7 Geo. 4, c. 64, s. 9, it is enacted, that if any person shall counsel, procure, or command any other person to commit any felony, the person so counselling, &c., shall be deemed guilty of felony, and may be indicted and convicted either as an accessary before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be

indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice. This indictment may be taken as an indictment against the parties as accessaries *before*, and accessaries *after* the fact. They were so treated at the trial. Whether it is also a substantive felony is another question, which I will deal with presently. The indictment is the same, except that *a certain evil-disposed person* is substituted for *Henry Moss*. How can this make it less or more an indictment against them as accessaries? If it makes it a bad indictment altogether, I cannot help that. There is no decided case against me at all. The first question is, what is the consequence of so treating it? The first consequence is, that we must inquire what is the effect of the conviction of an accessary, when the principal is not convicted. If the late statutes have not altered the matter, the general rules of law are quite clear. In Lord Sanchar's case, it was held that the attainder would be reversed after he was hanged. (9 Coke, 119). I will just cite the authorities. There is 1 Hale, P. C. p. 618. Before the statutes a party receiving could only be tried for a misdemeanour, he was not an accessary at all. The prisoners have not waived any right by being compelled to plead. If the principal were convicted, and not attainted, the accessary could not be tried. In 2 East, P. C. p. 446, it is so stated.

Lord ABINGER, C. B.—Is there any doubt that by the common law the accessary could not receive judgment unless the principal were attainted, and that he could not even be tried without his own consent?

Clarkson, for the prosecution.—There is not any doubt on that subject.

Bompas, Serjt.—Then the question will be, whether this is an indictment under the statute. The indictment

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certainly concludes against the form of the statute. All previous statutes are repealed, and therefore the 7 Geo. 4, c. 64, and the 7 & 8 Geo. 4, c. 29, are the statutes on which the Court must decide. Without going through all the previous statutes which are set out in 2 East, P. C. p. 743, I will just call the attention of your lordships to the state of the law. By the statute of Anne, receiving was indictable as a misdemeanour. This was a distinct simple charge. The effect of the present statute is to make that a felony which before was a misdemeanour. There is some slight difference between the clauses in the two acts, but one illustrates the other; and it will be seen that the crime of an accessary, and the crime of committing a substantive felony, were intended to be kept just as distinct as when one was a misdemeanour and the other a felony. The material words are, "and may be indicted and convicted either as an accessary after the fact, or for a substantive felony; and, *in the latter case*, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice." According to the well-known maxim "expressio unius est exclusio alterius," it is the same as if the legislature had said, not in the former case, but only in the latter.

Lord ABINGER, C. B.—If you indict him as an accessary, you must follow the rules of the common law. How would you frame an indictment against him for the substantive felony?

Bompas, Serjt.—This would be the form:—one silver tankard, &c., by a certain evil-disposed person then before stolen, &c., of the said evil-disposed person, feloniously did receive, well knowing &c.

Lord ABINGER, C. B.—The only difference then is, that the indictment in question is a little longer than the one you read.

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Bompas, Serjt.—That is not exactly so. This indictment contains several distinct offences.

TINDAL, C. J.—You see it all relates to one transaction; it does not relate to separate transactions.

Bompas, Serjt.—The parties never saw each other, and yet evidence was given of what was said by each.

Lord ABINGER, C. B.—That is only a difficulty which arises in every case where more than one prisoner are charged in the same indictment.

Bompas, Serjt.—If they were tried as accessaries when they were not accessaries, then it will be wrong.

BOSANQUET, J.—The question must be, how were they indicted?

Bompas, Serjt.—If they were improperly tried, the question for the Court will be the same, for they will have been improperly convicted. The argument on the other side must be, (because it was so at the trial), that this is all one substantive felony, and that is what is meant by the statute. The term substantive means that if the whole put in the indictment is a substantive felony, that is sufficient.

PARKE, B.—It means an offence that does not depend upon the conviction of the principal.

Bompas, Serjt.—If the parties are to be tried for substantive felonies, they must be indicted alone; and they can only be indicted together, if they are indicted as principal and accessaries.

Lord ABINGER, C. B.—Will it not come to this? Sup-

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posing my Brother Littledale was wrong in trying all together and treating it as one indictment, are we not to interfere?

Bompas, Serjt.—If I had the right to call on the prosecutor to elect, it will be a mis-trial. I now contend that the indictment is bad altogether. I refer, principally, to the case of Lewin Caspar, who is indicted as an accessary *before the fact*. The statute directs the attention to the goods, and you must state them in the indictment, but it is not necessary to state all the circumstances of the receiving. But as to Lewin Caspar, the case is totally different, because he is charged with inciting a certain person to commit a felony, and it cannot be contended that that person need not be named.

Lord ABINGER, C. B.—Suppose he was not known?

Bompas, Serjt.—Here he was known. It is clear that before the statute a man could not be indicted for inciting a person unknown. They ought to shew who he was if they can, and if they cannot, they must set out an excuse for it. They should either name him, or say that he is a person unknown. I cannot find any case since the statutes; but in the cases which occurred when it was a misdemeanour, the name was set out. In *Rex* v. *Fuller* (*a*), which was an indictment on the stat. 37 Geo. 3, s. 70, for endeavouring to incite and stir up a person serving in the army to commit an act of mutiny, and in which Mr. Baron Gurney was counsel for the prisoner, the name of the party was set out.

GURNEY, B.—The objection I took there was, that the mode of inciting was not set out.

(*a*) 1 B. & P. 180.

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Bompas, Serjt.—But if the man's name had been omitted too, would it not have been an objection?

Lord ABINGER, C. B.—We had a case reserved as to the murder of a child (*a*).

GURNEY, B.—The situation of the prisoner is the same as if the indictment had added the words, "to the jurors unknown." It gives him as much information.

Lord ABINGER, C. B.—The difficulty would be in pleading autre fois acquit to a second indictment.

MAULE, J.—You must give as much information as you can.

Bompas, Serjt.—They are bound to insert the name if it is known.

Lord DENMAN, C. J.—Otherwise, the prosecutor may reserve it in his own breast to select which he will prove of forty different offences.

Bompas, Serjt.—The difference is very material between an indictment as accessary, and for a substantive felony. These are the grounds on which it strikes me that the opinion of the learned Judge at the trial was correct—viz. that the prisoners were indicted as accessaries, and therefore they could not legally be convicted without the principal.

Clarkson, for the prosecution.—The conviction is perfectly good. I take it that Mr. Serjt. *Bompas* has raised three objections: 1st, that the indictment is, in the ordinary sense of the term, against principal and accessaries, and, therefore, cannot be supported, because the principal

(*a*) *R.* v. *Bias*, ante, Vol. 8, 773.

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is not convict, attaint, or outlawed; 2nd, that we ought to have been called on to elect against whom we intended to proceed, as there appeared several distinct charges against the different prisoners; 3rdly, that the indictment cannot be supported as against the accessary *before* the fact. As to the first objection, supposing the indictment was strictly against principal and accessaries, yet the conviction is good, as no objection was taken on the part of the accessaries to their being tried before the principal was forthcoming. The prisoners should have objected before they were given in charge, and have no right to take the chance of being acquitted by the jury, and afterwards take the objection. The accessary can only object when called upon to plead (*a*).

Lord DENMAN, C. J.—Does not that assume an indictment with a principal properly described?

Clarkson.—It may be so; and if there had been no statute or authority on the subject, we might have had some difficulty. But there are the cases of *R.* v. *Jarvis* (*b*), and *R.* v. *Wheeler* (*c*). In the former of those cases the indictment in one count set out the name of the thief, and in another count merely mentioned "a certain evil-disposed person."

GURNEY, B.—There was a case of a manufactory where servants were kept, and from the circumstance of the walls not being scaled, it was clear that the robbery must have been committed by a servant, and several persons were convicted of receiving the property, knowing it to have been stolen.

(*a*) See the case of *Reg.* v. *Ashmall*, ante, p. 236.

(*b*) 6 C. & P. 156. In that case it was held that a count was good, which charged the prisoner with receiving property which had been stolen by "a certain evil-disposed person," without naming him.

(*c*) 7 C. & P. 170. In this case a similar count was held good. See also the case of *Reg.* v. *Pulham*, ante, p. 280.

Lord DENMAN, C. J.—That is the sort of case to which the statute is more particularly directed.

COLTMAN, J.—There would be no difficulty in stating that the person was unknown.

Lord DENMAN, C. J.—But you do not want that here.

Clarkson proceeded to read the case of *R.* v. *Wheeler*.

PATTESON, J.—That was for a substantive offence. There is no objection to such a count in case of the charge of a substantive offence. But in any of these cases was there any count charging a party as accessary, which did not mention the name of the principal?

Clarkson.—There was not any such count: but I contend that the objection came too late; and as it is doubtful whether the words of the statute would not prevent any other trial after acquittal on this, they could have no right to lie by and take the chance of the verdict, and then raise the objection.

PATTESON J.—It would only be a waiver of the objection to being tried before or without the principal, but no waiver of any objection to the indictment itself.

TINDAL, C. J.—According to my Brother Littledale, the indictment alleges that a certain evil-disposed person stole certain goods, and that one person incited him to commit the offence, and others received different portions of the goods, and, therefore, it is contended, that the whole is only a history of the transaction.

Clarkson.—According to my Lord Hale, "an indictment is nothing else but a plain, brief, and certain narrative of an offence committed by any person, and of those neces-

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sary circumstances that concur to ascertain the fact and its nature;" and such is the present indictment. It is merely using the same substantive allegation with a greater copiousness of words. It has been the practice for the last twenty years to combine the principal and several accessaries without reference to time; and there are some instances, I believe, in which joint and several receivings have been combined in one indictment. Such an indictment is not for separate offences committed by them, but for separate acts committed by them in furtherance of the same felony. It is one transaction only, and the statement of the different parts of the same transaction are called counts; but it is all one charge in substance.

PATTESON, J.—Is there any case in which receivers of different goods at different times have been included in one indictment without the principal felon?

Clarkson.—There is not. But I shall shew, from my learned friend's own argument, that this is a bad indictment as against principal and accessaries; but he has not shewn any reason why it is not good as a charge of a substantive felony. In the report, in the case, of my friend's argument, it is said, "I admit these things were necessary to make a good indictment as against principal and accessary, but they were not necessary for the substantive felony." We, on the part of the prosecution, never considered it as a case of principal and accessaries. But my friend says, that if the indictment be for a substantive offence, then we cannot convict on it more than one person. The indictment is not new in principle. The true interpretation of the two statutes is, that, with the exception of the absence of the principal, there must be all the forms and incidents necessary to constitute the offence. As to the *accessary before the fact*, I feel myself much more pressed, for although I might say the statute looks to the incitement to the commission of a felony rather than

to inciting any particular person, yet it may be said there is a distinction between the two cases.

PARKE, B.—Have you considered whether this is not cured by the statute 7 Geo. 4, c. 64, s. 21? In the case of the Polish notes that question arose (*a*).

Clarkson.—But the statute provides that no person, however tried, shall be liable to be prosecuted for the same offence, and this makes it of very great importance to support this indictment. In conclusion, the object of the statute being to facilitate the bringing home of justice to accessaries, I submit that that object would be frustrated, or, at least, no benefit would be derived from the statute, if this indictment should be held not sufficient.

Lord DENMAN, C. J.—What difficulty would there have been in indicting each accessary alone?

Clarkson.—None, except that we must have had several trials; and I submit that we had the right to take them altogether.

Bompas, Serjt., commenced his reply.

PARKE, B.—What did you mean by election at the trial? to convict one and let off the others? In 8 East, 46, *Lord Ellenborough* says, that where to the offences charged in different counts there may be the same plea and the same judgment, there is no authority that such joinder in one indictment is bad in law. That seems to be the gene-

(*a*) See *R.* v. *Harris* and *Others*, Vol. 7 of these Reports, p. 429. The statute 7 Geo. 4, c. 64, s. 21, provides, that where an offence has been created by statute, the indictment or information shall, *after verdict*, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute.

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ral rule; but in 3 T. R. 106, the alternative is stated thus: "If it appear, before the defendant has pleaded, or the jury are charged, that he is to be tried for separate offences, it has been the practice of the judges to quash the indictment, lest it should confound the prisoner in his defence: but these are only matters of prudence and discretion. If the judge who tries the prisoner does not discover it in time, I think he may put the prosecutor to make his election on which charge he will proceed."

MAULE, J.—That refers to a case where there were several charges against one defendant, and there it might not be known; but where there are several defendants, it must be known.

PARKE, B.—It makes a very material difference to the justice of the case, whether the objection is taken at a time when it can be rectified, or not.

Bompas, Serjt.—The indictment is not the same in principle, unless it is an indictment against principal and accessary. As to the 21st section of the 7 Geo. 4, c. 64, that requires the offence to be described in the words of the statute, which has not been done here.

PARKE, B.—Only on the supposition that this may be taken as a bad count as against principal and accessary, and a good collection of charges as against substantive offenders.

Bompas, Serjt.—Then consider what is meant by describing "the offence." Can it mean that you may say that some person committed it?

PARKE, B.—It would be bad on demurrer; but if you plead, you cannot object to it afterwards.

MAULE, J.—The words are not pursued here, because the word "other" is not inserted in the indictment.

Lord ABINGER, C. B.—The sum of your argument is, that the statute does not describe the offence, but only provides that the accessary may be tried without the principal. It only gives a new mode of prosecution.

Bompas, Serjt.—Mr. Justice Buller says, that in criminal cases it is never too late to revise what has been done.

PATTESON, J.—Does that apply against the very words of an act of Parliament?

Bompas, Serjt.—But I submit that this section does not apply to this particular case. As to the words substantive felony, Mr. Clarkson says, it means in one view, that it all relates to one transaction.

TINDAL, C. J.—The meaning was, that you should not charge an inciting to steal at different times different goods; that there must be only one substratum or corpus delicti.

Bompas, Serjt.—When you indict a party as accessary before the fact, the felony is the stealing the goods; when you indict for the substantive felony, the felony is the inciting. You cannot convert a count charging a person as accessary into a count for a substantive felony; but you must have two counts and this brings it within the cases in Carrington and Payne. In those cases there were two separate counts, but here it is not so.

PATTESON, J.—You say the distinction is that which you have just mentioned, now just look at this indictment, the felony is charged to be the receiving.

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Bompas, Serjt.—I do not refer to the form of the indictment only.

MAULE, J.—If the part stating the stealing stood alone, would it be any indictment at all?

Bompas, Serjt.—Every bad indictment is no indictment.

MAULE, J.—It is a finding by the Grand Jury that the goods were stolen.

Lord ABINGER, C. B.—It is only putting in the first instance that which is usually put last.

Bompas, Serjt.—My friend says we are too late, because we did not object before plea. This is not consistent with the passage in the Pleas of the Crown. There must be a distinct requisition of the prisoner to say whether he will be tried or not. He cannot know unless he is informed whether the principal has been convicted or not.

1840. *March.* Their Lordships took time for further consideration, and at the March Sessions of 1840,

WILLIAMS, J., gave judgment, and stated that the Judges were of opinion that the conviction as to Lewin Caspar was incorrect in point of law, and that the judgment must be arrested (*a*). His Lordship said with reference to the prisoners who were charged with receiving, "The Judges have considered the question, and, having considered it, they have come to the conclusion that there was

(*a*) Lewin Caspar was afterwards convicted, on an indictment charging him with inciting Henry Moss to commit the felony, and was sentenced to be transported for seven years.

nothing erroneous in that part of the prosecution, and that upon those counts which charged you as receivers of stolen goods, well knowing them to have been stolen, you were, in point of law, properly convicted, and the conviction ought to be sustained.

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Ellis Caspar, and Emanuel Moses, were sentenced to fourteen years' transportation, and Alice Abrahams to four months' imprisonment, to be reckoned from the time of passing the sentence.

NOVEMBER SESSION, 1839.

BEFORE MR. BARON PARKE.

REGINA v. HENRY and TAUNTON.

1839.
Nov. 30*th.*

A. & B. were indicted for the offence of robbery. The jury found that A. took the property of the prosecutor from him by violence, and that B. was present during part of the time, and that he was a party with A. to a design to bring the prosecutor to the place where he was robbed by A., and to obtain property from him on a false charge of an unnatural crime, but that he was not aiding or assisting in or privy to the taking of the property from the prosecutor by violence:—*Held*, by all the Judges, that in order to convict B., the indictment should have been framed on the statute 1 Vict. c. 87, s. 4, and that he could not since the passing of that statute, under the circumstances of this case, be convicted on an indictment charging the offence of robbery.

THE prisoners were indicted for a robbery on Jabez Poulson, on the 1st of October, at St. John the Evangelist, Westminster, putting him in fear, and taking from his person, and against his will, one watch, value £1; three rings, value 1*l.* 5*s.*; one sovereign, one shilling, one sixpence, two pence, and four halfpence, his property.

The prosecutor said, "I am a working jeweller, in the employment of Brown & Kay, manufacturing jewellers, Tavistock-row, and have been nearly eight years in their employ. On Monday, the 30th of September, I was walk-

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ing to my lodging from Brown & Kay's between seven and eight o'clock in the evening, I think nearer eight, and saw the prisoner Henry; I stopped to look at some books in St. Martin's Court, and he came up and remarked on the cheapness of them; I said they were so; I put the book I had in my hand down and walked on to Leicester-square; he walked with me as far as my own door, and then wished me good night; he had followed me and entered into conversation. On the evening of the 1st of October I had just come from my own house to go out for a walk after business, about half-past eight o'clock; I was passing down my own street, and at the corner of James-street Henry came up to me and said, "How do you do, Sir?" this was about four doors from my own house; I acknowledged the compliment and walked on; he followed and entered into conversation with me; I went down the street towards Charing-cross, and passed on through Charing-cross past the Horse-Guards; he still continued walking with me; I kept straight on down the street towards the front of Westminster Abbey, not Parliament-street but the street on the right hand side; I went on down Dean-street, and when we got down Dean-street, near the corner of Peter-street, he seemed suddenly to recollect himself, and he remarked that a friend and himself were going to open an eating-house, that the men were at work on the premises, and he would go and see how they got on, and would I go with him? I went with him to No. 66, Peter-street, as I have since ascertained, it was about the middle of the street; when we got to the door he took a key from his pocket and opened the side door in the passage close to the street door; he went in first, I did not follow him immediately; I did not intend to go in, but he turned round and asked me to step in, which I did; the moment I stepped in he closed the door, and seizing me by the collar said, 'Now you are in my power;' there was a candle burning on a little shelf in the corner of the shop which was under repair; there were workmen's tools there; I said, 'What do you mean?' he said, 'I will shew you

what I mean, let us see what you have about you:' I struggled with him to get loose; he said it was of no use, he would call the police and give me in charge for unnatural practices, if I attempted to make the least noise; he then tore open my waistcoat and trowsers, turned my pockets inside out, and took from my trowsers pocket one sovereign, one shilling and sixpence, and some halfpence; at that moment I heard footsteps in the passage, and a man's voice call out 'Henry!' Henry did not answer, and I heard footsteps go to the back of the house, and I saw Taunton throw open a sash-window and come into the place where we were; I am certain he is the man; Henry was about removing my watch-guard from my neck at the time he came in, it was a black ribbon; Taunton said, 'Holloa, Henry, what have you got there?' Henry replied, 'Oh it is all right, a regular b——; after that Henry proceeded to take the rings from my fingers; I resisted him rather faintly, I confess, for I was in great trembling and fear; Taunton then said he would fetch in the policeman and give me in charge; Henry said, 'Oh never mind, let him go, we have got all we can;' he let go of me, and I then made my way into the street and got home as well as I could."

The jury found both the prisoners guilty, saying, at the same time, they thought that Taunton knew that Henry was to bring the prosecutor to the house, and that property was to be obtained from him by a threat to accuse him of an unnatural offence, but that he did not consent to or assist in the taking of the property from him by violence.

PARKE, B.—That raises a question of law, which I shall reserve for the opinion of the Judges, at least for the opinion of some of the Judges. My opinion is, that in order to convict Taunton you ought to have framed the indictment upon the statute.

Henry was sentenced to be transported for fifteen years, and the judgment against Taunton was respited.

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Carrington, for the prosecution.

Payne, for the prisoner Taunton.

[Attornies, *King* & *Attwaters*, and *Beetholme*.]

His Lordship reserved the question for the opinion of the fifteen Judges, and in the case submitted to them, after stating the facts, proceeded as follows:—"The jury found Henry guilty—they found that Taunton was present at the time of the taking of the rings, and was a party with Henry to a design to bring the prosecutor there, and to obtain money or property from him on a false charge of an unnatural crime; but that he was not aiding or assisting in, or privy to the robbery committed by Henry, by taking from the person of the prosecutor.

"It seemed to me, that since the statute 1 Vict. c. 87, s. 4, the offences of robbery, and obtaining money or goods on a charge of sodomy, were distinct offences, and that Taunton could not be considered, under these circumstances, as a principal in the second degree to the robbery."

The case was afterwards considered by the Judges, who held that Taunton could not be properly convicted on this indictment (*a*).

(*a*) The stat. 7 & 8 Geo. 4, c. 29, s. 7, enacts, "that any one who shall extort a chattel or money, or valuable security from another, by threatening to accuse him of an infamous crime, he shall be deemed guilty of robbery, and indicted and punished accordingly."

The stat. 1 Vict. c. 87, s. 4, does not use the same language, but enacts, "that whosoever shall accuse &c., and shall by intimidation by such accusation extort any property, shall be guilty of felony, and punished by transportation for life, or not less than fifteen years, or be imprisoned for any term not exceeding three."

The case was to have been argued by counsel, but in consequence of the number of days occupied by the arguments in the cases of *Reg.* v. *Frost*, &c., for high treason, the case was not argued, but the Judges being in favour of the objection, the prisoner Taunton was afterwards discharged out of custody.

See the case of *R.* v. *James Norton*, ante, Vol. 8, p. 671, and the cases there referred to.

COURT OF COMMON PLEAS.

Adjourned Sittings in London, after Michaelmas Term, 1838.

BEFORE LORD CHIEF JUSTICE TINDAL.

STEINKELLER *v.* NEWTON.

Dec. 15*th*.

To an action to recover damages for the non-performance of several contracts, by which the defendant undertook to deliver divers quantities of spelter within certain specified times, the defendant pleaded, 1st, that the plaintiff induced him to enter into the contracts by fraud, covin, and misrepresentation; and, 2nd, that he would have delivered the spelter within the times specified, but was hindered from doing so by the fraud, &c., of the plaintiff:—*Held*, that the defendant had the right to begin.

THE declaration was for the non-performance of several contracts, by which the defendant undertook to deliver divers quantities of spelter to the plaintiff within certain specified times. The damages were laid at £5000. The pleas were, 1st, that the plaintiff caused and procured the defendant to enter into and make, and that he the defendant was induced to and did enter into and make, the said several contracts and promises in the said declaration mentioned, and each and every of them, through and by means of the fraud, covin, and misrepresentation of the plaintiff; and, 2ndly, that the defendant was always, from the time of making the said several contracts and promises in the said declaration mentioned, ready and willing to deliver, and would have delivered, the said several quantities of spelter within the times specified, but was hindered from doing so by the fraud, &c., of the plaintiff:—*Held*, that the defendant had the right to begin.

It is no objection at Nisi Prius to the reception of depositions taken on interrogatories, that there was an alleged breach of faith on the part of the defendant in examining witnesses on interrogatories at all. But if there was any irregularity in proceeding with the commission, as for instance, if it were executed without any notice to the plaintiff to enable him, if he pleased, to put cross interrogatories, such irregularity is a good objection to the admissibility of the depositions, and the Court, if they have been received at Nisi Prius, will grant a new trial, and direct a fresh commission to be issued.

To enable a witness to use a paper written by himself for the purpose of refreshing his memory, it must be shewn that the paper was written contemporaneously with the transaction it refers to. A witness, who had been examined on interrogatories in a foreign country, stated in one of his answers the contents of a letter which was not produced:—*Held*, on the trial of the cause in England, that so much of the answer as related to the contents of the letter was not receivable in evidence, although it was urged in support of its admissibility that there were no means, as the witness was out of the jurisdiction of the English Courts, of compelling the production of the letter.

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tities of spelter, &c., within the several times, &c., but was wholly hindered and prevented from delivering them, and from performing his contracts, by the fraud and covin of the plaintiff, &c. The plaintiff, in his replication, traversed the facts stated in the pleas.

A question arose as to who was entitled to begin.

TINDAL, C. J., was of opinion, that as the defendant had pleaded fraud and covin, he was entitled to begin, and the plaintiff might afterwards, if the defendant failed in making out his case, go into evidence of the damage sustained by him in consequence of the breach of contract.

Kelly then stated the case for the defence.

For the defendant a witness was called, who was a London merchant in correspondence with several houses at Hamburgh. In the course of his examination in chief he was asked by the counsel for the defendant the following question:—"Do you know whether Mr. Steinkeller deals largely in spelter?"

Wilde, Serjt., for the plaintiff, objected to the question.

Kelly, for the defendant.—A man may know of another having large dealings in a particular article.

Wilde, Serjt.—If the plaintiff deals so largely, there must be persons who have had dealings with him, and they are the persons to prove them.

TINDAL, C. J.—You must have the agents or the brokers who dealt with him to prove the facts.

To refresh the memory of the witness, it was proposed to put into his hands a paper which he had delivered to the

defendant's attorney in the month of June, 1838, after the cause had been set down for trial.

Wilde, Serjt., objected.—The paper is not made contemporaneously with the facts. It is not made without a motive, but being written for one of the parties after the cause was set down for trial, is clearly not admissible in evidence.

Kelly.—It is only to refresh the memory of the witness; if it were made at the time, or the next day, it would be admissible; and it ought to be admitted, if it was made within a sufficiently short period from the transaction for the Judge to say, that the recollection of the transaction was more fresh in the memory of the witness. The paper was written twenty months ago, and why may it not be used to refresh the witness's memory as to a date although it was written some time after the transaction? There must be a reasonable construction put upon the rule.

TINDAL, C. J.—The difference is this. It must be confined to papers written contemporaneously with the transaction.

The witness was not allowed to look at the paper.

In the course of the defendant's case certain depositions, which had been taken under a commission to examine witnesses, were tendered in evidence.

Wilde, Serjt., for the plaintiff, objected to their being received. On the 22nd December, 1837, the cause stood for trial, and application was made to your Lordship to postpone the trial on account of the absence of a material witness of the name of Scheller. An order of your Lordship bearing that date was made, directing that the cause should be a remanet to the Sittings after Hilary Term,

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1838, and certain wine warrants, together with a certain sum in money, were deposited as security; and there was a further term in the order that a commission should issue to examine certain witnesses. By the Sittings after Hilary Term, 1838, no commission had been issued, and the plaintiff's attorney wrote to the defendant's attorney informing him that he should consider the commission as abandoned, and should subpœna his witnesses. The answer received was, that a bill had been filed, and as the plaintiff was in Poland an injunction was obtained. Since then no notice has been given of any commission, or anything of the kind. The parties on the other side say, as I understand, that they consider the letter to have been a dispensation with any further notice on the subject of the commission.

Kelly, for the defendant.—This is quite a matter of course. The order of your Lordship as to the commission is, "And I further order, that a commission issue for the examination on interrogatories of the witnesses for the defendant." No time is fixed within which the examination was to take place; and I deny the right of the plaintiff's attorney to limit the time, when the Judge has not limited it. It is sufficient if the commission be executed before the trial takes place.

TINDAL, C. J.—The trial ought to have taken place at the Sittings after Hilary Term. The question is, whether they have not been misled?

Kelly.—If they have, it is their own fault. The letter written by the plaintiff's attorney was that he should consider the commission abandoned, as it had not been issued previous to the Sittings after Hilary Term. After this the defendant's attorney told the plaintiff's attorney that the commission was not abandoned.

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TINDAL, C. J.—Should not the letter of the plaintiff's attorney have called for some answer in writing? Why did not the defendant's attorney write an answer?

Kelly.—He was not obliged to write. The commission was dated the 24th of May, 1838, and required the examination to take place on or before the 1st of November in the same year.

TINDAL, C. J.—This is not the place to discuss the admissibility of the depositions, it must be done before the Court on affidavits.

Wilde, Serjt., for the plaintiff.—My objection is not to the issuing of the commission, but to the issuing of it without notice. We had no notice of the commission, and no copies of the interrogatories proposed to be put, and no request of cross interrogatories. I do not at all argue whether a commission might not properly issue after the Sittings after Hilary Term. But my objection is to the want of all notice; and I apprehend this is the place to make the objection, as the objection goes to the reception of evidence: and it is a question for the Judge who is to decide as to the reception of the evidence.

Kelly, for the defendant.—I can shew, if it is admissible here, that the opposite party has had all the notice to which by law he is entitled. I believe the practice to be, that application is made to the other party to learn whether he will join in the commission and bear part of the expense, and if he refuses, his opponent may proceed without him. But this is not the place for the inquiry. Here is an order of the Court, and the commission produced is regular upon the face of it. If this matter were to be inquired into, it would lead to the trial of a collateral issue in every case in which a commission was produced.

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Wilde, Serjt.—There is a case of *Cazenove* v. *Vaughan* (*a*), where the Court refused to entertain the application, because the facts were not brought before the Judge at Nisi Prius. Mr. Justice *Le Blanc* said, "In this case there was no evidence given at the trial to shew that the defendant had not liberty afforded him to cross-examine, or that he might not have exercised it." And Mr. Justice *Bayley* said, "I think it must be taken from the circumstances stated, that the defendant had liberty to cross-examine, and did not choose to exercise it; for when the interrogatories in chief were served upon him he might have applied for time, had he been desirous of putting cross interrogatories, and there was no proof at the trial that it was his intention to cross-examine." Lord *Ellenborough* gave judgment on the general ground (*b*); but the other two Judges, who at that time constituted the rest of the Court, expressly mention the particular reason.

TINDAL, C. J.—I cannot shut out the evidence of the depositions. I think I must receive it, and take a note of your objection.

Wilde, Serjt.—Your Lordship understands me as tendering the evidence I have mentioned?

TINDAL, C. J.—Yes: evidence of irregularity in the issuing of the commission.

The depositions were then read. A witness who had been examined at Hamburgh, stated, in his answer to an

(*a*) 1 M. & S. 3. In that case it was held that a deposition was admissible at the trial, because the defendant had notice of the time of the examination, and might have cross-examined at that time, or applied for further time for that purpose, and not having done either, it must be presumed that he did not wish to cross-examine.

(*b*) See note (*a*).

interrogatory, the contents of a letter which was not produced.

Wilde, Serjt., objected that this part of the answer was not admissible, as it was not the best evidence.

Kelly and *R. V. Richards*, contrà.—A letter which you cannot compel the production of, as the parties are without the jurisdiction of the Court, is the same as a letter which has been lost. This is similar to a case in the Exchequer, where a man refused to produce his title deeds, and the Court could not compel him; yet Mr. Baron *Parke* admitted secondary evidence of the contents.

TINDAL, C. J.—I think it would be a most inconvenient and a most dangerous rule to hold that it should rest in the option of the party examined whether he will produce the document or not. We have no power to compel the witness to give any evidence at all; but if he does give an answer, that answer must be taken in relation to the rules of our law on the subject of evidence.

That part of the witness's answer which stated the contents of the letter was rejected.

The case proceeded, and the jury eventually found a

Verdict for the plaintiff—Damages £500 (*a*).

Wilde, Serjt., and *Petersdorff*, for the plaintiff.

Kelly, *R. V. Richards*, and *S. Martin*, for the defendant.

[Attornies—*Bennett & B.*, and *C. Knight.*]

(*a*) We understand that the plaintiff moved for a new trial, though the verdict was in his favour, because he thought that the testimony of the witnesses examined under the Commission had reduced the amount of the damages to a sum considerably below that to which he was entitled.

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In the ensuing Term a rule nisi for a new trial was obtained on the ground that the Commission had been irregularly issued and executed without notice to the plaintiff; and also that it was issued and proceeded with contrary to good faith. When the rule came on to be argued, the Court refused to enter into the question of good faith; but the Commission appearing to have been issued irregularly, the rule was made absolute for a new trial, under an arrangement by which a fresh Commission was to be issued.

Adjourned Sittings in London after Michaelmas Term, 1839.

BEFORE MR. JUSTICE MAULE,

(*who sat for the Lord Chief Justice*).

1839.

Dec. 9th.

BYERS and Others, Assignees of CLARK, a Bankrupt, *v.* SOUTHWELL.

The protection given by the stat. 2 & 3 Vict. c. 29, s. 1, to contracts with bankrupts and executions against their property bonâ fide executed or levied before the date and issuing of the fiat of bankruptcy, is not receivable in evidence in an action of trover by the assignee against an execution-creditor, either under the plea of not guilty or a plea that the plaintiffs were not lawfully possessed of the goods as assignees at the time of the alleged conversion.

Semble, also, that the latter plea does not render it necessary for the plaintiffs to prove the petitioning creditors' debt.

TROVER.—The first count alleged a conversion of the goods while they were the goods of Clark, before the bankruptcy. The second count alleged that the plaintiffs were lawfully possessed of the goods as assignees of Clark, and that the defendant converted them to his own use.

To the first count the defendant pleaded not guilty, and to the second he pleaded that the plaintiffs were not lawfully possessed of the goods as such assignees in manner and form as in that count mentioned. There was also a plea of leave and license (*a*).

(*a* There was another plea which stated that the fiat in bankruptcy was issued on the 28th July, 1837, on the petition of William Byers,

Kelly, for the plaintiff, put in the fiat and the appointment of the assignees. It appeared that there were three sets of two each (*a*).

Platt, upon this, submitted that it must be shewn whether these persons were in partnership or not, as the petitioning creditors' debt would differ in amount according as they were or were not so. He contended that it was necessary to prove the petitioning creditors' debt as it was put in issue by the plea above set out.

Kelly, contrà, submitted, that it was not put in issue by the plea, and therefore need not be proved.

MAULE, J., was inclined to think that it was not put in issue by the plea, and referred to a case of *Jones* v. *Brown* (*b*), as an authority on the subject.

S. T. Watson, John Austin & John Benson Austin, and Arthur Beloe & W. Fisher, claiming to be creditors of the said J. C., and that there was not, before or at the time of issuing the said fiat, any debt or debts due or accruing due to W. B., S. T. W., J. A. & J. B. A., A. B. & W. F., from John Clark, sufficient to support the said fiat according to the statute in force concerning bankrupts. To this plea there was a replication, which was demurred to, and judgment after argument was in Michaelmas Term, (November 8th), 1839, given for the plaintiff on the demurrer.

The decision, according to the report in 6 Bing. New Cases, p. 39, was, that under 6 Geo. 4, c. 16, where a petitioning creditor's debt turns out to be insufficient to support a fiat, and the Chancellor orders the commission to be proceeded in on proof of a sufficient debt by any other creditor, the debt of the second may be added to that of the first to make up the requisite amount.

(*a*) See this explained in the preceding note.

(*b*) That case is reported in 1 Scott, 453. It was an action of trespass for goods, and the defendants, after alleging the bankruptcy and their appointment as assignees, justified the taking of the goods as belonging to them as such assignees. The plaintiff replied, that the goods *were not the goods of the defendants as such assignees*, but were the goods of the plaintiffs. It was *held* that the replication denying only that the goods in question belonged to the assignees admitted that the assignees were entitled to the goods of the bankrupt, and therefore that it was unnecessary for the defendants to give *any proof of the bankruptcy* or their appointment as assignees.

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BYERS v. SOUTHWELL.

In the progress of the cause it became necessary to read a letter written by the bankrupt and addressed to the defendant. There was an admission that the letter was written by the bankrupt and sent by post. But the admission did not state when it was sent, and there was not any post-mark on the paper produced, which appeared to have been originally contained in an envelope.

Platt, for the defendant, objected to the reading of the document without further evidence as to the time when it was sent.

Kelly, for the plaintiffs.—It will primâ facie be taken to have been sent by the post at the time when it bears date.

Platt.—It is important to shew, in order to affect the defendant, that the paper was sent at a particular time, and for aught that appears this may have been fabricated and dated back.

MAULE, J.—I think this is an admission that the document was signed by Clark, the bankrupt, and dated by him on a certain day; but I do not think that makes it evidence against the defendant. There is no proof of its being sent by the post at any particular time.

A witness was afterwards called who identified the letter as having been produced by the defendant at a time very near the day on which it bore date, and in consequence it was read. It appeared that Clark left his place of business, and this letter was relied on as containing a statement of his intention to abscond in order to avoid his creditors, and so making his absence an act of bankruptcy, and itself being notice to the defendant of such act.

Platt, for the defendant, contended that the facts proved did not shew any act of bankruptcy, but that if they did,

the execution was protected, being bonâ fide, by the statute 2 & 3 Vict. c. 29 (*a*).

MAULE, J., was of opinion that there was not any special plea upon the record under which this statutory protection could be received in evidence, and that it was not admissible under the general issue of not guilty.

The verdict was eventually for the plaintiffs for 367*l.* 12*s.* 5*d.*

Kelly, *Hoggins*, and *Michie*, for the plaintiffs.

Platt and *Barstow*, for the defendant.

[Attornies—*A'Beckett & Co.* and *G. & W. Helder.*]

(*a*) By section 1 of that statute it is enacted, "that all contracts, dealings, and transactions by and with any bankrupt, really and bonâ fide made and entered into before the date and issuing of the fiat against him, and all executions and attachments against the lands and tenements, or goods and chattels of such bankrupt, bonâ fide executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the person or persons so dealing with such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not, at the time of such contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed: Provided also, that nothing herein contained shall be deemed or taken to give validity to any payment made by any bankrupt, being a fraudulent preference of any creditor or creditors of such bankrupt, or to any execution founded on a judgment on a warrant of attorney or cognovit given by any bankrupt by way of such fraudulent preference."

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HOGGETT *v.* EXLEY.

Dec. 10*th.*

As to the right to begin in those cases which are not within the rule of the Judges as to personal injuries, libel, and slander, but where the affirmative of the issue is on the defendant:—*Held*, that it must be left to the Judge to decide in each particular case, whether a substantial question is the assessment of damages, and if it is, the plaintiff will be entitled to begin.

THE declaration was on a charterparty, by which the defendant undertook to provide a cargo of corn from Marseilles to England, in the ship Spring. There was no plea of the general issue, but a special plea to the effect that after the making of the charterparty, and before any breach of the contract, an agreement was made between the plaintiff and defendant, that a cargo of cotton should be substituted for the cargo of corn, and that it was so substituted, &c. &c.

R. V. Richards, for the plaintiff, claimed the right to begin, on the ground that he was entitled to damages for the breach of the contract.

Bompas, Serjt., for the defendant objected.—If the defendant succeeds there will be no damages to assess.

MAULE, J.—That argument would prove too much.

R. V. Richards.—Wherever the plaintiff claims unliquidated damages, which must of necessity compel him to call witnesses, he is entitled to begin. This bears no analogy to the cases where the plaintiff seeks to recover a sum certain.

Bompas, Serjt.—As the Judges have laid down the rule, it is confined to personal injuries. I have heard Mr. Baron *Parke* say so most distinctly. And it is so laid down in *Carter* v. *Jones* (*a*). There was also a case as to the war-

(*a*) Vol. 6 of these Reports, p. 64. It was an action for a libel with pleas of justification, but no general issue, and was tried July 6th, 1833; and *Tindal*, C. J., stated the rule to be that the plaintiff should begin in all actions for personal injuries, and also in slander and libel, notwithstanding the general issue be not pleaded, and the affirmative be on the defendant. His Lordship added, in answer to an observation

ranty of a horse, which was tried before Mr. Justice *Coleridge* at the last Bristol Assizes, in which a similar decision was given (*b*).

MAULE, J.—I wish there was some rule which was imperative, and excluded all discretion on the subject. But there is not, and it must be left to the Judge to decide in each particular case, whether a substantial question is the assessment of damages, and if it is, the plaintiff ought to begin. And I think in this case that he ought to begin.

R. V. Richards then stated the plaintiff's case, and there was ultimately a

Verdict for the plaintiff—Damages £225.

R. V. Richards and *Wordsworth*, for the plaintiff.

Bompas Serjt., for the defendant.

[Attornies—*Murray* and *Tilson & Co.*]

made by *M. D. Hill*, for the defendant, "I do not see any hardship in the rule, as it is most reasonable that the plaintiff, who brings the case into court, should be heard first, to state his complaint." See also the note (*b*) to the case of *Aston* v. *Perkes*, ante p. 231.

(*b*) See the case of *Osborn and Others* v. *Thompson*, post, p. 337, and the authorities there collected together.

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BEFORE MR. JUSTICE MAULE.

INGRAM *v.* LAWSON.

Dec. 12*th.*

In an action for a libel upon a ship imputing unseaworthiness, the plaintiff may give evidence of special damage, although he has not averred it in his declaration, because a libel upon a chattel is not actionable, unless the owner sustain some damage thereby. Where a libel was published in a newspaper on the 31st of October, and the plaintiff commenced his action on the 4th of November, it was *Held*, that in the estimate of damages the jury need not confine themselves to the damage which accrued between the publication and the bringing of the action.

Where a special plea has been demurred to, the defendant's counsel has no right at the trial to allude to the statements in it in his address to the jury.

THE declaration stated in substance that the plaintiff carried on the business of a master mariner and shipowner, and was the commander and owner of the ship Larkins, which was about to sail for the East Indies, and being desirous of obtaining goods and passengers, he had inserted an advertisement in the Times newspaper, of which the defendant was the printer and publisher, notifying the time of sailing, &c., and that the defendant published of and concerning him in the way of his said business, and of and concerning the said ship, &c., a certain false, scandalous, malicious, and defamatory libel, &c., [setting it out]; by means whereof he was injured in his credit, and it was believed that his ship was unfit to carry passengers or goods, and he had been prevented from obtaining goods on freight, and passengers of respectability, on the intended voyage, &c.

The defendant pleaded, 1st, not guilty; 2nd, that the ship was not seaworthy; and 3rd, a special plea which was demurred to, and on which, before the trial, judgment had been given for the plaintiff (*a*).

The advertisement referred to was in the Times newspaper of the 31st of October, 1838, and was as follows:—"For Madras and Calcutta, will sail on the 28th December, the well-known fast-sailing teak ship Larkins, 700 tons, Charles Ingram, H.C.S., commander, lying in the East India Docks. This ship has excellent accommodation for passengers, and carries an experienced surgeon.—For freight or passage, apply to the commander, at the Jerusalem Coffee House, or to G. Haviside & Co., Sun Court, or 69, Cornhill."

(*a*) See 6 Scott, 775.

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The libel appeared in another part of the same paper, and was as follows :—"To the Editor of the Times.—Sir, —I think no apology necessary for troubling you with the following statement. I have but one motive in giving publicity to the communication. I overheard a servant in our establishment remark to one of his fellow-servants, that his old ship had returned to England at last; but that the captain had been obliged to put in at the Cape, and procure twenty additional hands to pump the ship, to enable her to complete her passage; but he understood the Jews had bought her, to take out convicts. With the recollection of the dreadful loss of life, which, in several instances, has occurred from ships not sea-worthy being employed for such purposes, I was induced to question the man, and learn that the ship's name is the Larkins. I think the captain's name is Ingram, late in the East India Company's Service. He tells me the voyage before last, when he was on board, they were obliged to pump every two hours, all the way from Calcutta; and on this last voyage she was constrained to obtain the additional hands I have stated, to keep the ship afloat. But she is now purchased by some Jews, for the purpose I have stated. I feel it my duty to give this publicity to it. I give you the statement as I heard it. I know nothing of the parties, and I have before remarked I have but one motive—viz. the possible prevention of the recurrence of some fearful calamity.—I am, Sir, your obedient servant— W. T."

A clerk of the attornies for the plaintiff produced a certificate from the Stamp-office, to shew that the defendant was registered there as the printer and publisher of the Times newspaper.

Platt, for the defendant, asked the witness, on cross-examination, whether he did not know the author of the libel, and whether he was not a person named William Tyler?

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Kelly, for the plaintiff, objected to the attorney's clerk being asked any such questions, as he could only acquire the information from the conduct of the cause in the office.

MAULE, J.—Of course, as the attorney's clerk, he will understand that he is only to say what he knows of his own knowledge, and not what he has learned from his situation, as clerk to the attornies in the cause.

The witness said that he did not know of his own knowledge who the author was, and the inquiry was not further pressed.

It was then proposed to read the examination of a witness named Walton, who, with others, had been examined on interrogatories before Mr. Mellor, the barrister. There was an admission that the witness was abroad, and the attorney's clerk stated that he remembered that Walton and others were examined before Mr. Mellor, and that counsel attended both for the plaintiff and defendant.

Platt, for the defendant.—This is not sufficient to let in the evidence. I cannot deny that an examination de facto took place, but that does not shew that the paper tendered contains the notes taken by Mr. Mellor.

Mr. Mellor's clerk was then called, and proved Mr. M.'s handwriting to the notes taken; and just at the moment Mr. Mellor himself happened accidentally to enter the Court, and no further objection was made to the reading of the examination.

After several witnesses had proved that the vessel was seaworthy, a witness was stating that a gentleman named Boyd had engaged his passage, but in consequence of the libel had refused to go.

Platt objected.—The declaration does not allege any special damage, by naming any particular persons.

Kelly.—If we may not give specific instances, we may give general evidence of persons having made application, and afterwards not going by the ship.

MAULE, J.—What do you say is put in issue by not guilty?

Platt.—The publication of the libel.

MAULE, J.—Then all the rest is admitted.

Platt.—There is no allegation at all of special damage.

MAULE, J.—There is an allegation that several passengers refused to go.

Platt.—That is not sufficient without naming them.

MAULE, J.—I think that this being a libel, not on a man but on a chattel, it makes a difference. To say that a ship is unseaworthy is not a libel. To shew that the owner lost something in some way is necessary in order to sustain the action. The plea of not guilty admits that some damages must be given; and I think that Mr. Kelly is at liberty to shew by the evidence he proposes what the damage is.

Platt.—Then I contend that he must confine himself to four days, because the writ was issued four days after the publication of the libel.

Kelly.—I submit that I am not to be so confined in my evidence. There was a case in which a reporter for a newspaper brought an action against Mr. Harvey, the proprietor. The action was commenced before the end of the Session of Parliament, but the trial did not take place till after the Session had closed, and that became a matter

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of certainty at the trial, which, if it had taken place earlier, would have been a matter of uncertainty. Lord *Denman*, at Nisi Prius, yielded to the objection, that the plaintiff could only recover for the time which occurred previous to the commencement of the action: but a rule for a new trial was immediately granted by the Court, on the ground that his impression was wrong, and that unless the injury is of such a nature as that actions can continually be brought from time to time, the jury may give all the damage fairly sustained up to the time of the trial.

Platt.—Assuming what your Lordship has laid down, viz. that no action is maintainable without shewing some damage, it is the more necessary that the evidence should be limited to what occurred before the commencement of the action, viz. the 4th of November, 1838; what occurred afterwards cannot form a part of the cause of action, according to your Lordship's ruling, and therefore cannot be given in evidence.

Channel for the plaintiff.—The declaration is for a libel on the plaintiff as well as on the ship, and the Court of Common Pleas have admitted it to be so on the argument on demurrer.

Platt.—Then it is not to be distinguished from the case of slander of an individual, and the special damage must be stated in the declaration.

No other witnesses were examined on the part of the plaintiff.

Platt addressed the jury for the defendant.—No one can doubt that this is a letter received from a person professing to know the facts, and inserted with an honest desire to protect human life. It is matter of history that a convict

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ship, the Amphitrite, with 150 souls on board, was lost off Boulogne. It is the duty of an editor of a newspaper to invite discussion upon such important matters. If application had been made for the name of the author, and it had been refused or not given, would not the plaintiff's counsel have proved the fact? And as they have not done so, I call on you to infer that the name of the author was given. They do not shew that any application was made to the editor of the Times to insert any contradiction of the letter; and the plaintiff brought his action a few days after. This shews that the object was damages, and not the setting of the matter right by an explanation of the real character of the vessel. The question is, what damage has Capt. Ingram sustained between the 31st of October and the 4th of November? The vessel was not out of dock at the time: no passengers are named in the declaration as having declined to go in the ship in consequence of the libel. The learned counsel was then proceeding to refer to the plea which had been demurred to, when

Kelly objected. And *Platt* contended that he had a right to refer to the plea, as the record had been made up for the jury to assess the damages *according to the premises* on which the plaintiff had put himself on the judgment of the Court——

Humfrey.—The case of *Codrington* v. *Lloyd* (*a*), shews that a record made up without a plea demurred to, is bad.

MAULE, J.—The plaintiff has put himself on the judgment of the Court as to the whole declaration.

Platt was then proceeding to state that the plea was evidence, as shewing what the plaintiff had admitted to be true.

MAULE, J.—You surely do not mean to contend that

(*a*) 1 Per. & D. 157.

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you have a right to assume the facts stated in the plea as admitted?

Platt.—Yes. But I also refer to the plea as shewing the conduct of the plaintiff in the management of the cause.

MAULE, J.—I think it is not competent for you to state these pleadings to the jury at all (*a*). I consider *the premises* to refer to the declaration. At first I was disposed to think, till Mr. Humphrey cited a case to the contrary, that the plaintiff, not being obliged, but having voluntarily chosen to bring the plea before the jury, you might contend that you were at liberty to observe upon it; but as he was compelled to do it, I think it makes the objection to your alluding to it much stronger.

Platt continued his address to the jury.—It is admitted, on all hands, that there was a leak in the ship, and this might be sufficient to prevent passengers from going. I cannot say that this is not a libel upon the ship, but it is quite clear that there was no malice against Capt. Ingram; and I cannot say, after the evidence which has been given, that the vessel was not seaworthy. But with respect to the damages, as the object was only to invite discussion, and the columns of the paper were open for that purpose, I submit that they ought to be but small.

MAULE, J., (in summing up, inter alia), observed,—A good deal has been said about the absence of malice and

(*a*) See the case of *Firmin* v. *Crucifix & Staff*, Vol. 5 of these Reports, p. 98, which was a question of partnership; and *Thesiger*, for the plaintiff, referred to statements in a special plea, which had been held bad on demurrer, as shewing the connexion between the two defendants; but Lord *Lyndhurst*, C. B., said, that the special plea was out of the question, and the jury must decide the case upon the general issue.

the bona fides of the writer of this letter. But I think that a person looking at it carefully, may doubt whether it does not proceed from an interested party, as it begins and ends with a disclaimer of any motive. It is clearly a most injurious letter to the plaintiff, and calculated to occasion him serious loss as the owner of the vessel. It is signed W. T., which is suggested to mean William Tyler, but no evidence is given upon that subject. It does not appear that any inquiry was instituted, but the letter was immediately inserted; and a person who so acts, whether he is a public journalist or not, is answerable for the consequences. It seems to be admitted on both sides that the paper has a very extensive circulation. It is said that the plaintiff might have contradicted the statement, but that seems to me to be reversing the order of things, by requiring the person who is injured by the unfounded statement to take the trouble of correcting it, instead of the party inserting it without inquiry being expected to take pains to ascertain its truth, and if it is not true, himself to contradict it. Under all the circumstances of the case it will be for you to give to the plaintiff moderate, temperate, and reasonable damages—not vindictive or passionate—but such damages as you think naturally the consequences of the libel.

Verdict for the plaintiff—Damages £900.

Kelly, *Channel*, and *John Henderson*, for the plaintiff.

Platt, and *Humfrey*, for the defendant.

[Attornies—*Freeman & B.*, and *Dobie*.]

In the ensuing Term *Humfrey* moved for a new trial, on the ground that the learned Judge who tried the case

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ought to have limited the claim of damages, to such damages as actually accrued between the publication of the libel and the commencement of the action, but the Court

Refused a rule (*a*).

(*a*) See the case of *Hodsoll* v. *Stallbrass*, ante, p. 63.

BEFORE MR. JUSTICE COLTMAN.

GILLETT and Another *v.* WILBY.

Dec. 13*th*.

To an action for the infringement of a patent for certain improvements in a cabriolet, three pleas were pleaded: 1st, the general issue; 2nd, that the alleged improvements were not new; and 3rd, that the plaintiffs were not the true and first inventors of the improvements:—*Held*, that on this state of the pleadings it could not be contended, that the patent was illegal as being a monopoly.

Also, that though all the improvements claimed must be shewn to be new, yet it need not be shewn that the defendant's cabriolet was an imitation of the whole of them, but an imitation of one was sufficient to maintain the action.

Also, that the validity of the patent might be considered as having come in question under the 2nd plea, so as to entitle the plaintiff to a certificate to that effect under the 3rd section of the stat. 5 & 6 Will. 4, c. 83.

THE plaintiffs in their declaration complained of an infringement, by the defendant, of a patent they had obtained for certain improvements in a cabriolet. The pleas were, 1st., the general issue; 2ndly, that the alleged improvements were not new; and 3rdly, that the plaintiffs were not the true and first inventors.

The allegation in the declaration was, that the defendant unlawfully, &c., did use and put in practice one of the said description of vehicles called cabriolets, with the said improvements, and that the cabriolet so used by the defendant did imitate and resemble the said improvements.

The patent and specification were put in, from which it appeared that there were five different things which the plaintiffs claimed as their invention.

Ball, for the defendant, was contending that the patent was illegal, as being a monopoly.

M. D. Hill, for the plaintiffs, objected to this line of

argument, on the ground that there was not an issue to which it could apply.

COLTMAN, J., was of opinion that if such a defence were intended to be relied on, it ought to have been specially pleaded.

Ball submitted, that under the last statute (*a*) it was sufficient to have given notice of the objection, which the defendant in this case had done.

COLTMAN, J., was of opinion that it was not sufficient.

Ball was then contending, that the plaintiffs must shew under the words of the declaration that the defendant's cabriolet imitated and resembled *all* the improvements.

COLTMAN, J.—I think it will be sufficient if it resembled any one. It is a divisible statement.

Ball.—In *Morgan* v. *Seward* (*b*), it is held that if a patent be for several improvements, and the jury find one of them not to be such, the patent is void altogether. I contend that every part must be new, or it is void altogether.

(*a*) 5 & 6 Will. 4, c. 83, s. 5. That section enacts, "that in any action brought against any person for infringing any letters patent, the defendant on pleading thereto shall give to the plaintiff, and in any scire facias to repeal such letters patent the plaintiff shall file with his declaration, a notice of any objections on which he means to rely at the trial of such action, and no objection shall be allowed to be made in behalf of such defendant or plaintiff respectively at such trial unless he prove the objections stated in such notice: provided always, that it shall and may be lawful for any Judge at Chambers, on summons served by such defendant or plaintiff on such plaintiff or defendant respectively to shew cause why he should not be allowed to offer other objections whereof notice shall not have been given as aforesaid, to give leave to offer such objections, on such terms as to such Judge shall seem fit."

(*b*) 2 M. & W. 544. That case decides that, if a patent be taken out for several inventions, which are claimed *as improvements*, and the jury find that one of them is not an improvement, the patent is altogether void.

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COLTMAN, J., in summing up, said—The defendant's first plea is, that he is not guilty of the infringement. The question upon this will be, whether the cabriolet was used by the defendant, and whether it is an infringement of the patent right. The second plea is, that the improvements claimed are not new; and the third, that the plaintiffs were not the true and first inventors of them. On the first point the patent is put in, from which it appears that the plaintiffs claim not only the seat behind, but the mode of entry in front, &c. &c. It is true that the plaintiffs must make out to your satisfaction that the whole of the improvements were new, and that some of them have been pirated. It is not necessary that they should use them all, but they must be shewn to be all new, and if they are all new, and the defendant has infringed any one of them, it will be sufficient to support the action, and it is not necessary that he should have infringed them all. There are five different points in which the plaintiffs claim the invention as new, and if you are satisfied of that, then on the other point there is no evidence that they were not the first inventors, and then will come the question, whether the defendant has infringed any part of that which the plaintiffs claim as new?

Verdict for the plaintiff—Damages 1*s*.

M. D. Hill applied for a certificate, under the 5 & 6 Will. 4, c. 83, s. 3 (*a*), that the validity of the patent came in question.

(*a*) That section enacts, "that if any action at law, or any suit in equity for an account, shall be brought in respect of any alleged infringement of such letters patent heretofore or hereafter granted, or any scire facias to repeal such letters patent, and if a verdict shall pass for the patentee or his assigns, or if a final decree or decretal order shall be made for him or them, upon the merits of the suit, it shall be lawful for the Judge before whom such action shall be tried to certify on the record, or the Judge who shall make such decree or order to give a certificate under his hand, that the validity of the patent came

COLTMAN, J.—I think you are entitled to the certificate.

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Ball.—I was not allowed to question the validity of the patent.

COLTMAN, J.—I think that the validity of the patent has in part come in question, under the plea that the invention was not new. But I will look further into the subject.

The certificate was afterwards granted.

M. D. Hill, and *Shee*, for the plaintiffs.

Ball, for the defendant.

[Attornies—*Roy & Co.*, and *Cole.*]

in question before him, which record or certificate being given in evidence in any other suit or action whatever touching such patent, if a verdict shall pass, or decree or decretal order be made, in favour of such patentee or his assigns, he or they shall receive treble costs in such suit or action, to be taxed at three times the taxed costs, unless the Judge making such second or other decree or order, or trying such second or other action, shall certify that he ought not to have such treble costs."

BEFORE MR. JUSTICE ERSKINE.

OSBORN and Another *v.* THOMPSON.

Dec. 16*th.*

ASSUMPSIT on the warranty of a mare.—The declaration stated the warranty to be that the mare was sound,

In assumpsit on the warranty of a horse, where the plaintiff in his declaration averred that the horse was not sound; and the defendant only pleaded that it was; upon which plea issue was joined:—it was *Held*, that the plaintiff had the right to begin.

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with the exception of crib-biting. Averment, that it was not sound, except crib-biting. The only plea was that the mare was sound, according to the warranty, on which issue was joined.

Bompas, Serjt., for the defendant, claimed the right to begin.—There was a case of *Fisher* v. *Joyce*, tried before Mr. Justice Coleridge, at the last Bristol Assizes, in which, on the very same state of the pleadings, that learned Judge allowed the defendant to begin. The damages in this case are a pure matter of calculation, and Mr. Baron Maule, in a case tried here the other day, held that the assessment of damages must be a substantial question to give the plaintiff the right to begin (*a*).

ERSKINE, J., (having ascertained that Mr. Justice Coleridge was sitting for Lord Denman in the adjoining Court, sent to inquire of him about the decision at Bristol, and on receiving his reply), said, Mr. Justice Coleridge sends me word that he did rule in the manner mentioned by my Brother Bompas, but that he did it with much hesitation.

Bompas, Serjt.—It is very important that there should be one rule on the subject.

Atcherley, Serjt., for the plaintiff.—The question here is, what is the substantial issue on the record? it is only a conversion of terms, sound and unsound. The test is, who would have the verdict if no evidence were given on either side? The defendant, and not the plaintiff, would have the verdict. It is not like a new fact introduced by the plea.—[*Talfourd*, Serjt., being referred to by *Atcherley*, Serjt., stated as amicus curiæ, that L. C. J. Tindal had decided, that in a case like the present, the plaintiff was entitled to begin.]

(*a*) *Hoggett* v. *Exley*, ante, p. 324.

Humfrey, also, for the plaintiff.—In the case of *Cox* v. *Walker*, where the same issue was raised, Lord *Denman*, C. J., held, that the plaintiff was entitled to begin, and he did so on this ground, that if no evidence were offered, the defendant would be entitled to the verdict. In our declaration we allege, that, in consideration that the plaintiff would buy a mare, the defendant undertook that it was sound, &c., and we aver that it was unsound. Could we recover if we did not prove that the defendant had broken his warranty? Certainly not. It is as much an issue on the plaintiff as on the defendant. The question arises in cases of non-repair (*a*), as well as cases relating to the warranty of horses.

Bramwell, on the same side.—The new rules do not apply to this case. The defendant says that he affirms the horse to be sound; but we affirm it to be unsound, and the one is just as much an affirmative as the other. Then, each party making an affirmative proposition, on whom does it lie to make out a cause of action, no such being confessed on the record? If the plaintiff avers that a man is dead, and the defendant says that he is alive, is not the onus on the plaintiff of proving that the man is dead?

Bompas, Serjt., for the defendant, was referring to a case.

ERSKINE, J.—I think you had better discuss it upon the principle. At present my impression is that the principle is against you.

Bompas, Serjt.—The test mentioned by Mr. Humfrey is as completely arguing in a circle as any I ever met with.

ERSKINE, J.—Must not the plaintiff prove that the horse was not sound?

(*a*) See the note at the end of this case.

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Bompas, Serjt.—That is a complete begging of the question. Suppose the complaint were, that the defendant undertook to deliver a sound horse, and the defendant said, "I did deliver you a sound horse," would he not be bound to prove it? It is quite clear that he would. Each man is bound to perform his part of the contract. The defendant admits that the plaintiff performed his part by not denying it.

ERSKINE, J.—Supposing you were to call a witness who had never seen the horse in question, but some other horse; what would be the consequence?

Bompas, Serjt.—I should be defeated. I should lose the verdict. As to the averment that a man is dead, that argument does not apply, as a man is presumed to be alive till the contrary is shewn. The question is, has the defendant performed his contract? He undertakes to prove that he has, and the onus lies upon him.

ERSKINE, J.—If there had been no other authority but the case before Mr. Justice Coleridge, and I had not had the benefit of consulting him, I should have felt some difficulty in deciding. But I have from my Brother Coleridge the expression of his own doubts on the case. And, further, I have the statement of my Brother Talfourd, that the Lord Chief Justice of this Court decided, in a case like the present, that the plaintiff was entitled to begin. On principle, on whom does the burden of proof lie? Suppose the defendant had not appeared, or called any witness, would the plaintiffs be entitled to a verdict, merely on proof of the damages? Certainly not; they would be bound to prove that the horse was unsound. On the contrary, if the plaintiffs failed, the defendant would be entitled to a verdict; and it cannot make any difference that the defendant appears by counsel, who is prepared to call witnesses in support of his case. I think the plaintiff is entitled to begin.

Atcherley, Serjt. then stated the plaintiff's case.

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The trial lasted two days, and terminated eventually in a juror being withdrawn.

Atcherley, Serjt., *Humfrey*, and *Bramwell*, for the plaintiffs.

Bompas, Serjt., and *Shee*, for the defendant.

[Attornies—*Lofty & P.*, and *Roy & Co.*]

In the case of *Soward* v. *Leggatt*, ante, Vol. 7, p. 615, Lord *Abinger*, C. B., said, "Looking at these things according to common sense, we should consider what is the substantive fact to be made out, and on whom it lies to make it out. It is not so much the form of the issue which ought to be considered as the substance and effect of it," &c. &c. This was an action of covenant, and the breach in the declaration was that the defendant did not repair the premises, but suffered them to become ruinous, &c., and the plea was, that the defendant did repair the premises, and did not suffer them to become ruinous, &c. In the case of *Belcher and Others* v. *Macintosh*, ante, Vol. 8, p. 720, in which the pleadings were similar to those in *Soward* v. *Leggatt*, *Alderson*, B., said, "I think the plaintiff ought to begin, for if no evidence was given on either side, the defendant would succeed." See also the cases of *Harnett* v. *Johnson*, ante, p. 206; *Aston* v. *Perkes*, ante, p. 231; *Steinkeller* v. *Newton*, ante, p. 313; and *Hoggett* v. *Exley*, ante, p. 324.

CENTRAL CRIMINAL COURT.

JANUARY SESSION, 1840.

BEFORE MR. BARON GURNEY, AND MR. JUSTICE ERSKINE.

1840.

Jan. 9th.

REGINA *v.* GEORGE DALY.

The law does not authorize a private person to forego a prosecution upon any terms; and even if a promise be given and broken in such a manner as a jury would consider scandalous, yet, in point of law, that will not make any difference.

THE prisoner was indicted for stealing, on the 6th of May, fifty-two yards of woollen cloth, called buckskin, of the value of 13*l.* 13*s.*, the goods of W. Jamieson Anson, his master.

The prisoner had been in the employ of the prosecutor for about two years and a half; and it appeared in the progress of the case, that, on the night of the 13th of November, the warehouse of the prosecutor had been opened by means of a false key, and a quantity of superfine black cloth of the value of £150 had been stolen; and in consequence, a placard was issued, offering a reward of twenty guineas for the discovery of the thief. On the cross-examination of the prosecutor, he was asked, whether he had not, in consequence of some conversation he had with the prisoner on the subject of that robbery, signed a certain paper? He admitted that he had. It was read, and was as follows:—

"I, W. Jamieson Anson, promise and pledge myself that, provided George Daly, now in the employ of the said W. Jamieson Anson, makes known any circumstance or circumstances connected with or proving a recent felonious robbery of sundry cloths mentioned in a certain handbill or placard, and belonging to my employer or employers;

or, in other words, any circumstance or circumstances connected with a robbery of any property belonging to my employer or employers aforesaid, in which I have at any time been concerned, either directly or indirectly, do promise as aforesaid to forgive him, the said George Daly, and not prosecute, according to law in any court of justice, him, the said George Daly, provided he, the said George Daly, do make known the whole of the circumstance or circumstances aforesaid, or do make known, without disguise or deceit, the possessors, or purchasers or receivers of the said cloths or property, which may in any way or manner tend to lead to a recovery of the said property without purchase.—Dated this 12th day of December, in the year of our Lord, 1839, at No. 106, Wood Street, Cheapside, London.

"Signed by me, W. JAMIESON ANSON."

The prosecutor stated, that the above paper was dictated and composed by an inspector of police; and that, in consequence of it, he received a paper from the prisoner, which commenced as follows:—"I, George Daly, on my oath, do now declare before my master, Mr. W. J. Anson, to tell all I know concerning the robbery at No. 106, Wood Street, Cheapside." It then set out an account of various pieces of buckskin which, at different times previous to the robbery of the 13th of November, he had pledged at various pawnbrokers' shops. But there was not any information on the subject of that robbery. The prosecutor added, that, being satisfied from particular circumstances that the prisoner must be able to give information on the subject of that robbery if he pleased, he told the prisoner that he should not, under the circumstances, consider himself bound by the paper he had signed; and the prisoner was in consequence taken into custody.

Bodkin, for the prisoner, commented upon the extraordinary nature of the document which the prosecutor had

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signed; and contended, that, having signed it, he ought afterwards to have had the prisoner apprehended and indicted.

GURNEY, B., in summing up, with reference to that part of the case, said—The law does not authorize any private person to forego a prosecution upon any terms. Even if a promise were given, and broken in such a way as you would say was scandalous, yet, in point of law, that would not make any difference. But there is no ground for complaint against the prosecutor in this case, as he, being desirous of obtaining information as to the robbery on the 13th of November, told the prisoner that, as he had not received from him any information on that subject, he should not consider that he was any longer bound by the promise which he had made.

Verdict, guilty—Sentence, transportation for twelve years.

Payne, for the prosecution.

Bodkin, for the prisoner.

[Attornies—*J. A. Teague* and *W. C. Humphreys*.]

REGINA *v.* WHITE and SELLERS.

Jan. 9th.

If a servant take his master's property and hand it over to another as a gift, it is as much a felony as if he sell it or take it to a pawnbroker's and pledge it.

THE prisoner Elizabeth White was indicted for stealing, on the 3rd of January, one towel, value 6*d.*; three candles, value 3*d.*; 4oz. weight of soap, value 2*d.*; 1½lb. weight of bread, value 4*d.*; and 1½oz. weight of butter, value 2*d.*; the goods of James Peat, her master; and the prisoner Mary Ann Sellers was charged with feloniously receiving the same, well knowing them to have been stolen.

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The prosecutor stated, "The prisoner White was in my service as cook for about a fortnight and two or three days; in consequence of suspicion, on the 3rd of January, between six and seven in the evening, I went out of my house, and secreted myself a few doors off on the other side of the way; I could see my own door from that place; I had not been there above five minutes, when I saw White come out of the private door; I have more than one door; she had no bonnet on; I saw her come out of the house with something in her apron; she came up the street nearly opposite to where I was standing, when she was met by Sellers with a basket in her hand; White took something wrapped up in a white towel from her apron; Sellers opened her basket, and White put the bundle into it; they stood in conversation about two minutes, and then walked together towards Piccadilly; I followed them, hoping to meet a policeman; they went as far as the White Horse Cellar public-house before I could find one; I then gave them into custody; they did not see that I was following them; the basket was searched by the policeman, and in it was something wrapped up in a towel, which appeared to be the same bundle I had seen put in; it contained a quantity of bread, three kitchen candles, some soap, and some butter; I examined the towel, and knew it to be mine; there was nothing else in the basket which I claimed; Sellers was carrying it; I searched my house, and we missed the towel, some candles, bread, soap, and butter; we have missed two more towels besides: I know this towel to be mine."

On his cross-examination, he said, (inter alia), "The things are not worth eighteen-pence; but when I saw a bundle taken out, I thought it was something else, and when I got before the police I was bound to go on." It further appeared that the soap was common yellow soap; that the candles were broken; and that the bread was only a portion of a loaf.

For the defence it was contended, that the prisoner

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Elizabeth White did not intend to part with the towel to the other prisoner, but only used it to wrap up the other articles, which, being of small value, were given out of compassion, and without any felonious intent.

ERSKINE, J., in summing up, said—If the prisoner Elizabeth White, took the property and handed it over to the other prisoner as a gift, it is as much a felony as it would have been if she had sold it, or taken such part of it as could be so dealt with to a pawnbroker's, and pledged it. The purpose for which she took it is not material. If you think, as to the towel, that Elizabeth White did not intend to hand it over to Sellers to get rid of, then the case will be slighter against Sellers than if she did; because, in that case, she might not know but that Elizabeth White had the privilege of giving away the other things. You will say, whether you are satisfied that Elizabeth White took the property, intending to deprive her master of it; and if so, whether Sellers knew that the property had been stolen.

Verdict—both guilty, but recommended to mercy. Sentence, three months imprisonment.

Payne, for the prisoners.

BEFORE MR. COMMON SERJEANT MIREHOUSE.

REGINA *v.* WILLIAM SELL.

January 9th.

A prisoner who has pleaded guilty to a charge of larceny, and upon whom sentence has been passed, cannot afterwards be allowed to retract his plea, and plead not guilty.

THE prisoner, on his arraignment, pleaded guilty to an indictment, charging him with stealing three shillings and

six-pence, the monies of Andrew Pettinger, his master and employer, and sentence was passed upon him, in the absence both of his own counsel and the counsel for the prosecution.

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Clarkson afterwards, on behalf of the prisoner, applied to the *Common Serjeant* to allow him to retract his plea of guilty, and plead not guilty, alleging that it was the usual practice to allow such a course to be taken.

C. Phillips, for the prosecution, was willing that such a course should be adopted.

The COMMON SERJEANT doubted whether it could be done after judgment had been pronounced.

Clarkson observed, that the Court, during the Session, had power over its own judgment, and might vary it in any way, and if so, might also get rid of it altogether, and allow the case to be tried (*a*).

The COMMON SERJEANT still entertaining a doubt, referred the matter to the Judges in the adjoining Court—viz. Mr. Baron *Gurney* and Mr. Justice *Erskine*, who, according to his statement, were of opinion that it might be done.

The prisoner was then brought up, and asked if he was guilty or not guilty, and replied that he was not guilty.

(*a*) The ground upon which a sentence can be altered during the continuance of the session, proceeds, as we understand, upon the notion that the second judgment being, as it were, written over the first, vacates it. This would not apply to the getting rid of a judgment altogether, which can only be done in the proper way, where there has been any irregularity in it. But here there was not any irregularity in the judgment at first pronounced, and therefore it must stand unless varied by another judgment pronounced by the Court during the continuance of the session.

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But, on the case being again mentioned to *Gurney*, B., *Coleridge*, J., being present, and *Erskine*, J., absent, *Gurney*, B., stated, that he and *Erskine*, J., did not understand, when the matter was first brought before them, that sentence had been passed upon the prisoner (*a*); and both their Lordships, viz. *Gurney*, B., and *Coleridge*, J., expressed themselves clearly of opinion, that judgment having been once pronounced, the prisoner could not be admitted to plead not guilty. The result, therefore, was, that the sentence which had been pronounced remained in force, but, under the peculiar circumstances of the case, application for a remission of it was made to the Secretary of State.

C. Phillips, for the prosecution.

Clarkson, for the prisoner.

[Attornies— ———, and *W. C. Humphreys*.]

(*a*) This shews the inconvenience of the system alluded to in note (*a*) to the case of *Reg.* v. *Fuller and Others*, ante, p. 35. It is quite clear that the learned Common Serjeant must have mentioned to the Judges the fact of the sentence having been passed, as without that fact it would have been the ordinary case of a prisoner, being allowed to retract his plea, in which there is never any difficulty. But the matter being mentioned to the Judges privately, during the progress of another case, is very likely not to be completely understood, so as to enable them to come to a satisfactory conclusion.

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MARCH SESSION, 1840.

BEFORE MR. BARON PARKE.

Regina *v.* Thomas Morris.

March 6th.

Though to make a thing the subject of an indictment for larceny, it must be of some value, and stated to be so in the indictment, yet it need not be of the value of some coin known to the law, that is to say, of a farthing at the least.

THE prisoner was indicted for feloniously receiving, on the 11th of December, of a certain evil-disposed person, nine pieces of paper, value two shillings, of the goods of John Bentley and others, well knowing them to have been stolen.

The papers in question appeared to have been torn by some person out of a book kept by a coalmeter named Johnson, who, in his evidence for the prosecution, described the nature of the book as follows:—"It is a certificate book, which we receive out of the coalmeter's office when we go on board ships; they are certificates which we give to different merchants; they are not signed as they are in the book; there are blanks left for the name of the ship from which the coals are delivered, the quantity, the barge, the number of it, the lighterman, and to whose account they are delivered, and the date of the delivery. It is signed by the meter."

One only of these pieces of paper was traced to the possession of the prisoner.

At the close of the evidence for the prosecution,

Adolphus, for the prisoner, submitted, that there was not any case to go to the jury. The prisoner is charged with stealing nine pieces of paper. Only one of them is traced to his possession, and that is not of any value so as to sustain an indictment. It must be of the value of some coin known to the law.

Parke, B.—Though it may be of very small value, still

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it is worth something. You say that it must be of some assignable value—of the value of some coin. Shew me an authority for that position.

Adolphus.—The practice has been uniform on that subject. There must, I submit, be a value assignable.

Clarkson, for the prosecution.—We can shew how much the paper cost. But there is the case of the re-issued bank notes (*a*).

PARKE, B.—There is no doubt it must be of some value, and it is of some value. But it is quite new to me, that it must be of the value of some coined money—of a farthing at least.

Prendergast, for the prisoner.—Unless it be so, you cannot lay a correct statement of the value in the indictment. And there is the old maxim, "de minimis non curat lex."

PARKE, B.—It must be assigned of some value. You say of the value of some known coin. But I do not know any authority for that. I do not know that it could not be stated as of the value of a hundredth part of a farthing. Shew me some case where the indictment has failed on the ground of the article being valueless.

(*a*) *Reg.* v. *Clarke,* R. & R., C. C. R. 181. The prisoner was indicted for stealing promissory notes, and there were also counts for stealing certain pieces of paper stamped with a stamp, &c. The notes consisted of country bank notes, which, after having been paid in London, were sent down to the country to be re-issued, and were stolen on the road. It was argued in that case, as in the present, that the papers in their then state were worth nothing, and would not sell for so much as a farthing, and that nothing could be the subject of larceny which was not worth the smallest current coin in the kingdom. But the Judges held that the conviction on the counts for stealing the paper and stamps was good, the paper and stamps, particularly the latter, being valuable to the owners, which related to a promissory note.

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Prendergast.—*Phipoe's case* may be referred to as bearing on the question (*a*). But though there is not any case on the subject, yet it seems to me that it had been taken for granted in a great many. In *R.* v. *Clarke,* the charge was for stealing papers with stamps on them. The indictment here does not describe the papers as printed papers, nor as certificates, but only as nine pieces of paper. They are not writing paper; they can only be used as waste paper. There is only one produced; but, assuming that the whole nine had been traced to the prisoner's possession, they would not fetch anything like a farthing. The distinction which formerly existed between grand and petty larceny was, that petty larceny meant stealing goods of some value known to the law, but not of the value of a shilling. And, in civil cases, a farthing damages is the lowest amount that is ever given, because it is the lowest coin which is known to the law.

Clarkson.—The papers are not filled up. Therefore they are valuable as forms that may be used. And we can shew that the engraving, &c., would make one of them of the value of more than a farthing.

PARKE, B.—It is better to have the evidence of the fact.

A witness was called who said, "I charge 3*s.* $3\frac{3}{4}$*d.* for ninety-six of the papers, which renders the value of one about a farthing and a half." On his cross-examination he said—"One of the pieces of paper, without anything

(*a*) 2 Leach, 673; and 2 East, P. C. 599. That case, which related to a promissory note, was decided on the ground that the prosecutor had not any property in the thing taken. The Judges there said, that it was essential to larceny that the property stolen should be of some value, and that the note in question was so far from being of any value to the prosecutor that he had not even the property of the paper on which it was written.

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on it, would not be worth anything; it is only the fourth part of a sheet.

PARKE, B.—It has cost more than a farthing. Therefore the point does not arise. But I must be understood for one as not considering that it was necessary to shew that the article must be of the value of some known coin. It must be of some value, no doubt. There is clearly evidence to go to the jury that it is of the value of more than a farthing to the owners. It has cost them that. I have attended to the argument as to the description in the indictment, and it seems to me that that description is correct. If I should on consideration entertain any doubt, and it should become material for the prisoner, I will consider it further; but as at present advised, I think the description correct. I have not been able to find any case in support of the argument for the defence, nor have the prisoner's counsel been able to produce any.

The prisoner was acquitted on the merits.

C. Phillips, Clarkson, and *Bodkin,* for the prosecution.

Adolphus, Prendergast, and *Horry,* for the prisoner.

[Attornies—*Harmer & Steele,* and *Baddeleys.*]

See the case of *Reg.* v. *Bingley and Law*, Vol. 5 of these Reports, p. 602. The prosecutor in that case had been at market, and left all his money with the landlord of the inn where he had been, and on his way home was attacked by the prisoners, who knocked him down and took from him the only thing that he had in his pocket, viz. a small slip of paper, which contained a memorandum of a sum of money which a person owed him. *Gurney*, B., in summing up the case, said, "If anything was taken away from the prosecutor by violence, *however insignificant its value*, that is sufficient to constitute a robbery. In cases of robbery the value is immaterial, and the prosecutor, by carrying this memorandum in his pocket, shewed that he considered that it was of some value to himself." The prisoners were found guilty.

APRIL SESSION, 1840.

BEFORE MR. BARON ALDERSON.

REGINA *v.* GEORGE HARVEY.

April 13*th*.

THE prisoner was indicted for stealing, on the 6th of April, one gelding, of the price of £6, one set of harness, of the value of 10*s*., one cart of the value of £4, and three pigs, of the value of 3*l*. 19*s*., the property of John Regan.

The prosecutor said—"I live at Eastham, in Essex, and deal in pigs, which I take about in a cart. On Monday, the 6th of April, I met the prisoner at the Duke's Head public-house, Walthamstow, about half-past twelve o'clock; he was generally about that house; I had three pigs in my cart which had a pony to it with harness on; I had to shew some pigs to a lady, but I was taken very ill, and the prisoner said he would mind the cart if I gave him a pint of beer; I asked him to take the horse and cart, and shew the pigs to the lady; he was to have returned in a quarter of an hour, but I saw no more of him till he was in custody at Barnet; I never told him to sell the pigs, but to shew them to the lady." On his cross-examination he admitted that he told the prisoner what was to be the price of each of the pigs, if the lady should take a fancy to them, but he added—"He was only to shew the pigs to the lady; I told him the price, as he asked me what they were if she should ask him; he was not to sell them, only to see if they were the right size for the lady; she would not have bought of him; he was not trusted to sell them for me and receive the money; I would not have trusted him with the money; he was to bring the pigs back to

If the owner of goods employ a person, not in his service, to take them to a particular place, shew them to a customer, and bring them back, without authorizing him to sell them to, or leave them with the customer, and he, instead of taking the goods to the specified place, sell them for his own advantage, he will be guilty of larceny, inasmuch as the felonious intent came upon him at a time when he had the custody only, and not the possession, of the goods.

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me in a quarter of an hour, whether she liked them or not."

It appeared that the prisoner sold the three pigs to three different persons, and afterwards drove the horse and cart to Barnet, where he was taken into custody; and he then told the policeman that he was going to return them to the prosecutor, as soon as he had dined.

On the part of the prisoner it was contended, that with with respect to the horse and cart there was not any evidence that the prisoner intended to convert them to his own use; and with respect to the pigs he could not be convicted of stealing them, unless the jury were satisfied either that he was not in the situation of a bailee, or that he intended from the beginning to steal them, and offered to take care of the cart merely for that purpose, for which latter supposition it was argued there was not any foundation on the evidence.

ALDERSON, B., in summing up, said—There are two questions for your consideration in this case. The first is, whether the prisoner had a felonious intent from the commencement of the transaction; and the second, whether he received the pigs as bailee to deal with them, or only as a servant having the custody of them, and whose duty it was to bring them back. If the prosecutor meant that the prisoner should leave the pigs with the lady, and either bring back the money or make a bargain for the sale of them, then he will be in the situation of a bailee. The question is, whether they were delivered to the prisoner simply that he should shew them to the lady, and bring them back bodily; if they were, then if the felonious intent came upon him at that time, it would come upon him at the time when he had only the custody and not the possession, and in that case he would be guilty of stealing them. With respect to the horse and cart, it is clear that the custody of them only was delivered to the prisoner;

and then the question arises, whether he intended to steal them or meant to bring them back to the prosecutor.

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Verdict—Guilty of stealing the pigs, and not the horse, cart, and harness. Sentence, six months imprisonment.

Payne, for the prisoner.

BEFORE MR. RECORDER LAW.

REGINA *v.* CHAPPLE and Others.

April 14*th*.

THE indictment charged Thomas Chapple and Charles King with breaking and entering the dwelling of John Porter on the 7th of September, at St. Giles's in the Fields, and stealing therein fourteen silver spoons and various articles, the property of the said John Porter, and also charged Charles Chapple, Eliza Plant, Ann King, Henry Cox, and Sophia Cox, with feloniously receiving, harbouring, comforting, assisting, and maintaining the said Thomas Chapple and Charles King, well knowing that they had committed the felony.

To substantiate the charge of harbouring a felon it must be shewn, that the party charged did some act to *assist* the *felon personally*.

It appeared that the various prisoners who were charged with the offence of harbouring the felons had been found in possession of various sums of money derived from the disposal of the property stolen, but it did not appear, although they were in frequent communication with the persons charged with the felony, that they had received any of the stolen property itself, or had done any act to assist the felons personally.

At the close of the case for the prosecution,

LAW, Recorder, intimated an opinion that the offence charged, so far as Charles Chapple and the others not indicted for the stealing were concerned, was not made out

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by the evidence, as there was no act shewn to have been done by them to assist the felons personally. He referred to a case in which it had been held, that writing letters to intimidate the witnesses and prevent them from coming forward to give evidence, was not a harbouring and assisting of the felon. He then went into the adjoining Court for the purpose of consulting on the subject with Mr. Justice *Littledale* and Mr. Baron *Alderson*, and on his return said, "I have mentioned the case to the learned Judges as shortly as I could, so as not to cause an interruption of the public business, and the answer was what I expected, viz. that in their opinion the proof amounts to evidence of an imperfect receiving, and not to the offence charged in the indictment."

Verdict—Thomas Chapple and Charles King guilty of breaking and entering, &c., and the other prisoners not guilty.

Clarkson, for the prosecution.

C. Phillips and *Lucas*, for the defence.

BEFORE MR. JUSTICE LITTLEDALE AND MR. BARON ALDERSON.

REGINA *v.* CATHERINE MICHAEL.

April 14*th*.

A prisoner was indicted for the murder of her infant child by poison. It appeared that she purchased a bottle of laudanum, and directed the person who had the care of the child to give it a tea-spoonful every night. That person did not do so, but put the bottle on the mantel-piece, where another little child found it, and gave part of the contents to the prisoner's child, who soon after died:—*Held*, that the administering of the laudanum by the child was, under all the circumstances of the case, as much, in point of law, an administering by the prisoner, as if she had herself actually administered it with her own hand.

THE prisoner was indicted for the wilful murder of George Michael. She was also charged on the Coroner's Inquisition with the same offence.

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The indictment stated, that the prisoner, contriving and intending to kill and murder George Michael on the 31st day of March, in the third year of the reign of her present Majesty, upon the said George Michael feloniously, &c., did make an assault, and that the prisoner, a large quantity, to wit, half an ounce weight, of a certain deadly poison called laudanum, feloniously, &c., did give and administer unto the said George Michael, with intent that he should take and swallow the same down into his body, (she then and there well knowing the said laudanum to be a deadly poison), and the said George Michael the said laudanum so given and administered unto him by the said Catherine Michael as aforesaid, did take and swallow down into his body; by reason and by means of which said taking and swallowing down the said laudanum into his body, as aforesaid, the said George Michael became and was mortally sick and distempered in his body, of which said mortal sickness and distemper the said George Michael from &c. till &c. did languish, &c., and died; and concluding in the usual form, as in cases of murder.

It appeared that the deceased was a child between nine and ten months old, and that the prisoner was its mother, and was a single woman living in service as wet nurse at Mrs. Kelley's, in Hunter Street, Brunswick Square. The child was taken care of by a woman named Stevens, living at Paddington, who received five shillings a week from the prisoner for its support. A few days before its death the prisoner told Mrs. Stevens that she had an old frock for the child, and a bottle of medicine, which she gave her, telling her it would do the baby's bowels good. Mrs. Stevens said the baby was very well, and did not want medicine; but the prisoner said it had done her mistress's baby good, and it would do her baby good, and desired Mrs. Stevens to give it one tea-spoonful every night. Mrs. Stevens did not open the bottle, or give the child any of its contents, but put the bottle on the mantel-piece, where it remained till Tuesday,

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the 31st of March, on which day, about half-past four in the afternoon, Mrs. Stevens went out, leaving the prisoner's child playing on the floor with her children, one of whom, about five years of age, during the absence for about ten minutes of his elder sister, gave the prisoner's child about half the contents of the bottle, which made it extremely ill, and in the course of a few hours it died. The bottle was found to contain laudanum. The prisoner said that a young man, an assistant of Dr. Reid's, had given the bottle by mistake. This was proved to be untrue; and Dr. Reid stated, that in the course of a conversation he had with the prisoner, she used these remarkable words, speaking of the death of the child, and the probability of an inquest being held upon the body:—"If I am hanged for it, I could not support the child on my wages." It was also proved that the prisoner purchased the laudanum at a chemist's in Tavistock Place, Russell Square, saying that it was for her mistress, Mrs. Kelly, who was in the habit of taking it, being a bad sleeper. One of the medical men examined at the trial, said that a tea-spoonful administered to a child of the age of the deceased would be sure to destroy life.

ALDERSON B., in his summing up, told the jury, that if the prisoner delivered the laudanum to Sarah Stevens with the intention that she should administer it to the child, and thereby produce its death, and the quantity so directed to be administered was sufficient to cause death, and while the prisoner's original intention continued, the laudanum was administered by an unconscious agent, the death of the child, under such circumstances, would sustain the charge of murder against the prisoner. His Lordship added, that if the tea-spoonful of laudanum was sufficient to produce death, the administration by the little boy of a much larger quantity would make no difference.

The jury found the prisoner guilty. The judgment was respited, that the opinion of the Judges might be

taken, whether the facts above stated constituted an administering of the poison by the prisoner to the deceased child.

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Ryland, for the prosecution.

Ballantine, for the prisoner.

At a subsequent Session, Mr. Baron *Alderson*, in passing sentence upon the prisoner, said, that the Judges were of opinion that the administering of the poison by the child of Mrs. Stevens, was, under the circumstances of the case, as much, in point of law, an administering by the prisoner as if the prisoner had actually administered it with her own hand. They therefore held that she was rightly convicted.

MAY SESSION, 1840.

BEFORE MR. JUSTICE PATTESON AND MR. JUSTICE COLTMAN.

REGINA *v.* THOMAS CANNIFF.

May 11th.

THE prisoner was indicted for the manslaughter of Richard Fleming. He was also charged on the coroner's inquisition with the same offence.

From the evidence for the prosecution, it appeared that the prisoner was a blind man, who got his living by playing the violin. That on Saturday, the 11th of April, the

All struggles in anger, whether by fighting or wrestling, or any other mode, are unlawful, and death occasioned by them is manslaughter at least.

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deceased was at a public-house called the Hoop and Grapes, in Whitechapel, when the prisoner came in, and both parties having been drinking, the deceased challenged the prisoner to toss for a pint of beer. When they had done so, a dispute arose between them. The prisoner said he had won, and the deceased refused to pay; the prisoner went to lay hold of him, and the deceased pushed him away; the prisoner then unloosed a dog which was fastened to him by a string and tied it to the leg of the table, and went again to lay hold of the deceased, but was again pushed away; they then got hold of each other, and there was a struggle, and they pushed about from one side to another; there were no blows struck, but there were three falls, and the deceased fell undermost each time, and the third time the prisoner's knees came upon the lower part of the stomach of the deceased and ruptured the intestines, which rupture, according to the testimony of the surgeons, was the cause of death.

For the prisoner, it was contended, that he, being blind, laboured under a disadvantage when contending with a man who could see, and might in the scuffle have been actually pulled down by the deceased, instead of having thrown him down and forced his knees against him; and it was argued that the jury must be satisfied that the death of the deceased was occasioned by a wilful act on the part of the prisoner, before they could convict him of the offence of manslaughter.

PATTESON, J., in summing up, said—All struggles in anger, whether by fighting or wrestling, or any other mode—all kinds of contests in anger, are unlawful. And if you think the deceased's death was occasioned by an act of the prisoner in a struggle of that kind, I cannot tell you that it does not amount to manslaughter. If the prisoner was struggling, but did not attempt to throw him, I should tell you, it is not a case of manslaughter; but it is for you to say whether that is the fact or not. If the pri-

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soner laid hold of the deceased in anger, and struggled with him and *threw* him, then it is a case of manslaughter. If you can collect from the whole of the circumstances that the prisoner was pulled down against his will, and in consequence fell upon the deceased, then he will not be guilty. But there does not seem anything in the evidence to shew that the prisoner evinced any disposition to give up the contest. On the contrary, it appears that the contest was continued till the fall which occasioned the death. You have been told by the learned counsel for the prisoner that you must be satisfied that the death was occasioned by a wilful act on the part of the prisoner. In one sense of the word "wilful," I agree with him. I take it for granted he does not mean by it malicious, or intending to do injury; but that it must be the act of the will, and that it must be shewn that the prisoner attempted to throw the deceased. They had no right to struggle in this way; if it had been an amicable contest in wrestling, to see who was the best man, that would be quite a different matter.

Verdict—Not Guilty.

Payne, for the prisoner.

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JUNE SESSION, 1840.

BEFORE LORD CHIEF JUSTICE TINDAL AND MR. BARON PARKE.

Regina *v.* Courvoisier.

June 18—20.

The counsel for the prosecution, in opening a case of murder, has a right to put hypothetically the case of an attack upon the character of any particular witness for the crown, and to state, that if such attack should be made he shall be prepared to rebut it. He has also a right to read to the jury the general observations of a learned Judge, made in a case tried some years before, on the nature and effect of circumstantial evidence—if he adopts them as his own opinions and makes them part of his own address to the jury.

If additional evidence be discovered during the progress of a case, the counsel for the prosecution is not at liberty to open the nature of such evidence in an additional address to the jury.

THE prisoner was indicted for the wilful murder of Wm. Russell, Esq., commonly called Lord William Russell, on the 6th of May last

Adolphus, in stating to the jury the case for the prosecution, after detailing the substance of the evidence, observed, that he understood some attack on the part of the defence was to be made upon the character of the female servant, who was the principal witness, but that if any such attack were attempted, he shonld be able to shew that it was totally without foundation.

C. Phillips, for the prisoner, objected to Mr. Adolphus assuming that any such attack was to be made when he (Mr. Phillips) had not given any intimation of the kind, and, on the contrary, had no intention of doing any such thing.

Tindal, C. J.—Mr. Adolphus has a right to put the case hypothetically, and say, If the character of my witness should be attacked, I shall be able to shew that there is no foundation for any imputation upon her.

Adolphus, also, in the course of his comment upon the case, alluded to the subject of circumstantial evidence, and after reading from a printed book containing an account of the trial of a person named Patch, for the murder of a

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Mr. Blight, an extract from the address of the prisoner to the jury, was proceeding to read the observations of Lord Chief Baron Macdonald, who tried the case, upon the nature and effect of circumstantial evidence, when he was interrupted by

C. Phillips, for the prisoner, who submitted that it was not correct for his learned friend to be reading to the jury the observations of a judge in a particular case tried many years before.

TINDAL, C. J.—He has a right to use them as his own opinions. There is no objection to his adopting them as part of his own speech.

Adolphus continued to read the general observations of the learned Chief Baron, but did not refer to any of the particular facts of the case.

The trial commenced on Thursday the 18th, and after the Court adjourned on that evening, some additional and very important evidence was discovered; and at the sitting of the Court on the morning of Friday the 19th, *Adolphus* proposed to open the nature of the evidence which had been discovered, in a short address to the jury; but the Court were of opinion that he was not at liberty to do so, and the evidence was given without any statement of its nature being previously made to the jury. The trial concluded in the evening of Saturday the 20th. The prisoner was found guilty of the murder.

Adolphus, *Bodkin*, and *Montagu Chambers*, for the prosecution.

C. Phillips and *Clarkson*, for the prisoner.

[Attornies—*Hobler* and *Flower*.]

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REGINA *v.* RICHARD GOULD.

June 22nd.

Where anything is found in consequence of a statement made by a prisoner under circumstances which preclude its being given generally in evidence, such part of it as relates to the thing found in consequence is receivable, and ought to be proved. If a party charged with the crime of murder, committed in the perpetration of a burglary, be generally acquitted on that indictment, he cannot afterwards be convicted of the burglary with violence, as the general acquittal on the charge of murder would be an answer to that part of the indictment containing the allegation of violence.

THE prisoner was indicted for a burglary in the dwelling-house of John Templeman.

It appeared that the prisoner had made a statement to a policeman under some peculiar circumstances, which induced *Bodkin*, for the prosecution, with the approbation of the Court, to decline offering it in evidence; but in consequence of the statement containing some allusion to a lantern, which was afterwards found in a particular place, the policeman was asked whether, in consequence of something which the prisoner had said, he made search for the lantern.

TINDAL, C. J., and PARKE, B., were both of opinion that the words used by the prisoner, with reference to the thing found, ought to be given in evidence, and the policeman accordingly stated that the prisoner told him that he had thrown a lantern into a pond in Pocock's Fields. The other parts of the statement were not given in evidence.

The prisoner had been tried and acquitted on a charge of having murdered Mr. Templeman, at the time when the alleged burglary was committed, and in furtherance and prosecution of its commission.

PARKE, B., in summing up the case, told the jury that the charge in the indictment did not affect the life of the prisoner, as there was not an allegation that the burglary was accompanied by violence, and that if he had been indicted for burglary with violence, as he might have been convicted of manslaughter or even of assault on the indictment for murder, on which he had been acquitted altogether, in his opinion, that acquittal would have been an

answer to the allegation of violence if it had been inserted in the present indictment.

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REGINA v. GOULD.

The prisoner was found guilty, and sentenced to transportation for life.

Bodkin and *Ballantine*, for the prosecution.

[Attorney for the prosecution—*Hobler*.]

BEFORE MR. COMMON SERJEANT MIREHOUSE.

REGINA *v.* GRUNCELL and HOPKINSON.

June 23rd.

An ostler assisted in removing from a waggon, which stopped at the inn where he was employed, a quantity of hay which had been taken by the waggoner from his master's stables and put into the waggon, such hay not being allowed for the horses on the journey: —*Held*, that the ostler was properly indicted for *receiving*, because, as the hay was not allowed by the master for the horses, the moment it was removed by the waggoner from the stable to the waggon animo furandi, the larceny was complete.

THE prisoner Gruncell was indicted for stealing a quantity of hay, the property of his master, and the prisoner Hopkinson with receiving it, well knowing it to have been stolen.

It appeared that the prisoner Gruncell, who was a carter, and was allowed by his master a small quantity of hay for the use of the horses on their journey to and from London, on the day mentioned in the indictment, took from his master's stables two trusses of hay above the quantity which was allowed for the horses; and that the prisoner Hopkinson, who was the ostler at a public-house where the waggon stopped on the journey, came to the tail of the waggon, and received the two trusses of hay from the other prisoner, and carried them from the waggon to the stable.

Adolphus submitted that the indictment was wrongly framed as to the prisoner Hopkinson in charging him with being a receiver; because, if he had committed any offence at all, it was that of stealing, as the hay, being in the master's waggon, was in the master's possession in point of law, and the act of the prisoner, in removing it from the waggon, constituted a larceny, and not a receiving.

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REGINA v. GRUNCELL.

MIREHOUSE, C. S., was of opinion that the indictment was properly framed, but said he would consult Mr. Baron *Parke*, who was in the adjoining Court. He accordingly did so, and, on his return, said—"The learned Judge has gone very carefully, with me and Mr. Clark, through the cases on the subject, and he is clearly of opinion with me, that the indictment is properly framed; and he is so on this ground, that, as the hay was not hay appropriated by the master for the horses, the moment it got into the cart *animo furandi*, the larceny was complete. If it had been hay allowed for the horses which had been stolen, it would have been otherwise.

Verdict—Guilty.

Adolphus and *Payne*, for the prisoners.

WELCH SUMMER CIRCUIT, 1839.

CHESTER ASSIZES.

(Crown Side.)

BEFORE MR. BARON GURNEY.

REGINA *v.* BRIMILOW.

If on a trial of an indictment for a rape, it appear that the prisoner was under 14 years of age at the time he committed the offence, he must be acquitted of the rape, but the jury may convict him of an assault under the stat. 1 Vict. c. 85, s. 11.

RAPE.—The prisoner was indicted for a rape.

It appeared that the prosecutrix was eleven years old. The facts were clearly proved, and the charge was fully

made out by the evidence; but it was also proved, that the prisoner, at the time of the commission of the offence, was under fourteen years of age.

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REGINA v. BRIMILOW.

GURNEY, B., told the jury, that, as the prisoner was under fourteen years of age, he could not be convicted of committing a rape (*a*); but his Lordship left it to the jury to say, whether he was guilty of an assault under the stat. 1 Vict. c. 85, s. 11 (*b*).

Verdict—Guilty of an assault.

Hill and *Townsend*, for the prosecution.

Cottingham, for the prisoner.

The learned Baron entertaining a doubt, whether, as the law considered the prisoner, on account of his non-age, incapable of committing a rape, he could, on an indictment for a rape, be legally convicted of an assault under the stat. 1 Vict. c. 85, s. 11, and, having conferred with *Patteson*, J., his Lordship reserved the case for the opinion of the fifteen Judges; and the case being afterwards considered by the Judges, their Lordships held the conviction right.

(*a*) See the cases of *Reg.* v. *Groombridge*, ante, Vol. 7, p. 582, and *Reg.* v. *Phillips*, ante, Vol. 8, p. 736.

(*b*) Referred to ante, Vol. 8, p. 243, n. (*b*).

MIDLAND SPRING CIRCUIT, 1840.

NOTTINGHAM TOWN ASSIZES.

BEFORE MR. JUSTICE BOSANQUET.

REGINA v. BEST.

A. threatened B. that he would inform against him for selling spirits without a license, unless B. would give him a sum of money. B. had not, in fact, sold any spirits, but he gave A. the money to prevent an information:—*Held*, that A. was indictable under the stat. 18 Eliz. c. 5, s. 4, although B. had not committed any offence, and although no information was ever preferred nor any process sued out.

MISDEMEANOUR.—The first count of the indictment charged, that the defendant, disregarding the statute, (18 Eliz. c. 5, s. 4), *upon colour and pretence* that one William Peverill had committed a certain offence against a certain penal law, in this, that the said William Peverill had, before that time, sold, by retail, and delivered a quantity, less than two gallons, of certain spirits and distilled spirituous liquors, to wit, one quartern of gin to one Elizabeth Harper, without being duly licensed, against the form of the statute, &c., unlawfully and for wicked gain's sake, and without the order and consent of the Queen's Courts at Westminster, did make composition with the said William Peverill, and take from him three sovereigns, three half-sovereigns, and ten shillings, twelve pennies, and twenty-four halfpennies, as a reward for forbearing to prosecute for the said supposed offence against the form of the statute, and against the peace.

The second count was like the first, except that it stated the selling of the spirits to be in a certain house in the occupation of William Peverill, he not having a retailing license.

The third count stated the selling to be by retail without license.

It appeared from the evidence of William Peverill, that

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he kept a retail beer shop, but had no license to sell spirits, and that Elizabeth Harper, about twenty minutes after ten o'clock in the evening in question, came to his shop and asked for ale, which Peverill refused to let her have, saying that it was past hours. She then asked for a Christmas-box or new year's gift, to which Peverill answered, that he had a drop of gin in the house, which might be about a quartern, which he gave to her, and poured it into her mug. She then threw down sixpence on the tap-board, on which Peverill said, "No, I give it to you." She said, "No, I had rather pay for it." Peverill said, "No, Bessy, I have given it to you as a new year's gift." Whereupon she took up the sixpence and her mug and went towards the street door. On opening the street door, Peverill saw the prisoner, to whom Elizabeth Harper presented the mug with the gin in it, upon which the prisoner, addressing Peverill, said, "I have got you now, I have been waiting for you the last six weeks, and now I will do you." Peverill said, "What for?" He said, "For selling gin without a license." Peverill said, "I did not, I gave it to her as a new year's gift." He said, "I know you did sell it, I gave her sixpence to pay for it."

It further appeared, the prisoner soon after came to Peverill's house, and said, "Except you come to my house to-morrow morning by ten o'clock, and bring £4 or £5 with you to make it up, I will lay an information against you."

The statement of Peverill, as to giving the gin as a new year's gift, was confirmed by another witness; and it was satisfactorily proved, that the prisoner obtained from Peverill the money stated in the indictment, as a reward for forbearing to prosecute him for the supposed offence of selling gin without a license.

No information was actually preferred, nor any process sued out.

Miller, for the prisoner, submitted, that, as no offence

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had been actually committed by Peverill, (supposing his account to be true), and as no process had been issued, or information laid, against him, the case was not within the stat. 18 Eliz. c. 5, s. 4 (*a*).

Wild, for the prosecution, referred to the cases of *Regina* v. *Southerton* (*b*), and *Regina* v. *Gotley* (*c*).

(*a*) By which it is enacted, "that if any person or persons (except the clerks of the Court only for making out process, otherwise than is above appointed) shall offend in suing out of process, making of composition, or other misdemeanour, contrary to the true intent and meaning of this statute, or shall by colour or pretence of process, or without process upon colour or pretence of any matter of offence against any penal law, make any composition, or take any money, reward, or promise of reward, for himself, or to the use of any other, without order or consent of some of her Majesty's Courts at Westminster, that then he or they so offending, being thereof lawfully convicted, shall stand on the pillory," be disabled to sue in any action popular or penal, and forfeit £10; and Justices of Oyer and Terminer, Justices of Assize on their circuits and the Quarter Sessions, are empowered to hear and determine offences against this act." By the stat. 56 Geo. 3, c. 138, the punishment of the pillory was abolished as to this offence, and fine and imprisonment substituted for it.

(*b*) 6 East, 126. In that case, it was held that a threatening to put in motion a prosecution for penalties for the purpose of obtaining money to stay the prosecution, is not an indictable offence *at common law*, although it be alleged that the money was obtained; but Lord *Ellenborough* intimates an opinion that the charge might have been supported if the indictment had been framed on the stat. Eliz. c. 5.

(*c*) R. & R. C. C. 84. The prisoner was convicted of having compounded an offence against the Highway Act. Some of the counts stated, that the party from whom the money was taken had committed the offence; and the others stated, that the prisoner compounded and took the money by and upon colour and pretence of a certain matter of offence pretended to have been committed. It was proved, that the person from whom the prisoner took the money had incurred a penalty of £5 under the Highway Act, and that the prisoner had received money from him to compound it, but that no process had been sued out, and no information laid before any magistrate. *Le Blanc*, J., respited the judgment, upon a doubt whether the offence was within the stat. 18 Eliz. c. 5, inasmuch as no action or proceeding was depending, in which the order or consent of any Court in Westminster Hall for a composition could be obtained; but the Judges held

Bosanquet, J., reserved the point for the consideration of the fifteen Judges.

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Verdict—Guilty, subject to the opinion of the Judges on the point reserved.

Wildman, for the prosecution.

Miller, for the prisoner.

[Attornies—*Enfield* and *Payne & Maltby*.]

In the ensuing Term, the case was considered by the Judges, who held the conviction right.

the conviction right; and that the statute 18 Eliz., c. 5, applies to all cases of taking a penalty incurred, or pretended to be incurred, without leave of a Court at Westminster, or judgment or conviction.

PROMOTIONS.

In Easter Term, 1840, Mr. Serjt. *Adams*, Mr. Serjt. *Andrews*, Mr. Serjt. *Storks*, Mr. Serjt. *Ludlow*, Mr. Serjt. *Bompas*, Mr. Serjt. *Goulburn*, and Mr. Serjt. *Talfourd*, received patents of precedency, conferring on them the same rank that they held under the warrant of King William the Fourth.

In the Vacation after Trinity Term, 1840, *William Glover*, Esq., and *Stephen Gaselee*, Esq., were called to the degree of Serjeants-at-Law (*a*).

(*a*) It would seem that in the Table of Precedence in Blackstone's Commentaries, there is an error as to the rank of serjeants-at-law. They are there placed below knights' younger sons, and below colonels.

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Mr. Serjt. Manning, in his notes to "The case of the Serjeants," (p. 263), gives a copy of a petition from the serjeants to James the First, stating that there was a question between them and certain knights as to precedence, and praying his Majesty's directions, but the MS. from which he cites, concludes with the words, "Quære the yssue;" and the Learned Serjeant in his notes does not cite any authority, shewing exactly what rank the serjeants are entitled to take.—From the authorities and documents hereafter referred to, it would appear that the serjeants-at-law rank above masters in Chancery, who rank above knights bachelors.—Professor Christian, in his edition of Blackstone's Commentaries, published in 1809, says, (Vol. I. p. 406, n. 18), "In the two last heraldic processions at the funeral of Lord Nelson and Mr. Pitt, masters in Chancery and serjeants-at-law, had precedence before knights bachelors; and masters in Chancery had place inferior to serjeants-at-law.—The heralds say, that admirals and captains in the navy, and generals and colonels, and officers in the army, have no rank or place assigned them in a procession." In the copy of Blackstone's Commentaries, belonging to the Court of Queen's Bench, there is a MS. alteration of Blackstone's Table of Precedence, in the handwriting of Sir F. Pollock, by which serjeants-at-law are placed above knights bachelors, and this note is added by Sir F. Pollock, "so ruled by Sir Isaac Heard, Garter principal king-at-arms, at Lord Nelson's funeral." In the London Gazette of Jan. 14, 1806, the official account of Lord Nelson's funeral (which took place on the 9th of that month) is inserted; and from that it appears, that serjeants-at-law there took precedence of knights bachelors. In the same Gazette it is stated, that "within Temple Bar the procession was received by the Right Hon. the Lord Mayor of London, attended by the aldermen and sheriffs, and the deputation of the common council. The carriages of the deputation of the common council fell into the procession between the deputation of the great commercial companies and the physicians of the deceased, a conductor on horseback being appointed to indicate the station. The carriages of the aldermen and sheriffs fell into the procession between the knights bachelors and the serjeants-at-law, a conductor on horseback being there stationed for the purpose as before. The Right Hon. the Lord Mayor on horseback, bearing the city sword, was marshalled and placed in the procession between H. R. H. the Prince of Wales and the herald of arms, who preceded the great banner, in obedience to a warrant under his Majesty's royal signet and sign manual, bearing date the 6th instant, directing Garter principal king-at-arms, to marshal and place the Lord Mayor of London, on the present occasion, in the same station wherein his lordship would have been placed if his Majesty had been present." In the order of the ceremonial to be observed at Lord Nelson's funeral, published by the heralds' college just before it took place, serjeants-at-law are placed above masters in Chancery, and the latter above knights bachelors. We are informed by Sir James Shaw, Bart., who was Lord

Mayor of London at the time of Lord Nelson's funeral, that he claimed as Lord Mayor, to take precedence *in the city of London*, of every one except the Sovereign, which claim was, after some discussion, in effect allowed by the royal warrant before referred to, and he therefore, *in the city of London*, took precedence of H. R. H. the Prince of Wales.—In the London Gazette of March 1, 1806, which gives the official account of the funeral of Mr. Pitt, (which took place on the 22nd of February), neither serjeants-at-law nor masters in Chancery are mentioned, probably because none attended the funeral; but in the order of the procession, published by the heralds' college, shortly before the funeral, masters in Chancery are placed above knights bachelors, and serjeants-at-law above masters in Chancery, as in the order of the procession for Lord Nelson's funeral; and in this procession, (which was not in the city of London), the Lord Mayor was placed next below the privy councillors, who were not peers; the aldermen ranking in the same place as they had done at the funeral of Lord Nelson.

The Gazettes above referred to, will be found in the British Museum, and the orders of the ceremonials are remaining in the College of Arms. In a recent work on Precedency, by C. J. Young, Esq., York herald, is this note:—"The following precedency appears to have been observed at the funerals of Viscount Nelson and the Right Hon. William Pitt, viz.:—

Baronets.
Knights of the Bath.
Knight-Marshal.
Judge of the Admiralty.
Prime Serjeant, [rank altered in 1814—See 2 M. & S. 253].
Gentlemen of the Privy Chamber.
Attorney-General.
Solicitor-General.
Serjeants-at-law.
Masters in Chancery.
Knights Bachelors.
Divines.
Physicians.
Esquires.
Gentlemen."

But in a communication with which we have been favoured by that gentleman, he says, "The place and precedency upon the occasions alluded to, are in direct opposition to the practice observed in other ceremonials, wherein I have found the serjeants-at-law—viz. In a Parliament of Henry the 6th, the order of precedency was—

Judges.
Barons of the Exchequer.
Knights.
Attorney and Solicitor General.
King's Serjeants.
Serjeants-at-Law.
Sons of Knights.
Masters in Chancery, &c.

"And in the procession to Whitehall, on King William's return from Holland in 1697, the precedency was as follows:—

Judges.
Baronets.
Knights of the Bath.
Gentlemen of the Privy Chamber.
Master of the Ceremonies.
Grooms of the Bedchamber.
Chamberlain of the Exchequer.
Judge of the Admiralty.
Master of the Revels.
Knights Bachelors.
King's ancient Serjeant.
Other Serjeants.
Masters in Chancery, &c.

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"However, it is but rarely that serjeants-at-law are found in public ceremonials unconnected with the Courts."

In the Cott. MSS. in the B. Mus. (Jul. C. ix.) is a letter from Sir R. Cotton to Mr. Cook, recorder, which commences—"The speaker in *perlament*, called to be serjeant, hath precedence of that *cwifehood*;" and in the same collection (Vesp. F. ix. p. 40, et seq.) are some very curious papers respecting precedence; and among them is a copy of the petition of the serjeants to James the First.

Much other information, respecting the degree of serjeant-at-law, will be found in "The case of the Serjeants," edited by Mr. Serjt. Manning.

COURT OF QUEEN'S BENCH.

Sittings at Westminster after Hilary Term, 1840.

BEFORE LORD DENMAN, C. J.

BINGHAM *v.* STANLEY.

Feb. 6th.

A declaration on a check on a banker, stated that the plaintiff drew his check on W. & Co., and delivered it to B. L., who transferred it to the plaintiff. The defendant pleaded, 1st, that the check was given to B. L. as the nominal value of counters to play at an unlawful game, as B. L. knew, and that before the plaintiff took the check he had notice of the premises; and 2nd, a similar plea, in which, instead of an averment of notice, it was averred that the plaintiff gave no value for the check. Replication, denying the notice, and stating that the plaintiff gave a good consideration for the check:—*Held*, that on these pleadings the defendant must begin.

For the defendants the plaintiff's attorney was called, who was also the attorney of B. L.:—*Held*, that he might be asked where he last saw B. L., and whether he had ever seen B. L. and the plaintiff together; but that he could not be asked whether he had ever seen this check in B. L.'s possession.

ASSUMPSIT.—The first count of the declaration stated, "that on the 22nd of May, 1838, the plaintiff made his draft or order, called a check, on a banker, and directed it to Messrs. Wright, and thereby requested Messrs. Wright to pay himself or bearer £500, and then delivered the same to Benjamin Lisle, who then transferred and delivered the same to the plaintiff, who then became, and was, and is the lawful bearer thereof; and the said Messrs. Wright did not

pay the same, although the same was presented to them for payment thereof." Second count, for money lent. Third count, on an account stated.

Pleas (*a*)—first, that the account stated, which is mentioned

(*a*) As the form of the pleas and replication may be useful in practice, we have subjoined them.

Pleas—1st. As to the first and third counts of the said declaration, the defendant says, that the account in the said last count mentioned, was so stated as in that count is mentioned of and concerning the amount of the said draft or order in the first count mentioned, and on no other account whatever.

And the defendant further saith, that before the making of the said draft or order in the first count mentioned, and also before the making of the said promise of the defendant in the third count mentioned, to wit, on the 22nd day of May, A. D. 1838, he the defendant borrowed of the said Benjamin Lisle in the first count mentioned, and he, the said Benjamin Lisle, then lent to the said defendant in a certain common gambling room, in and parcel of a certain messuage and premises of the said Benjamin Lisle, divers, to wit, 500 pieces of ivory called counters, for the purpose, as the said Benjamin Lisle then well knew, of the defendant's illegally playing and gaming therewith, at and in the said gambling room, at a certain illegal game, to wit, the game of French hazard, contrary to the statute in such case made and provided; and the defendant further saith, that for securing to the said Benjamin Lisle the sum of £500, being the nominal amount and value of the said counters so by him lent to the defendant as aforesaid, for and in respect of the said loan of the said counters, and on no other account whatever, he the said defendant then, to wit on the day and year last aforesaid, made the said draft or order in the said first count mentioned, and directed the same to Messrs. Wright, Henrietta Street, and thereby requested the said Messrs. Wright to pay to himself or bearer the sum of £500, and then delivered the said draft or order to the said Benjamin Lisle, as in said first count is mentioned; and the said Benjamin Lisle then took and received the said draft or order of and from the defendant for and in respect of the said loan of the said counters, and on no other account whatever [↕]; and the said defendant saith, that before and at the time when the said Benjamin Lisle so transferred and delivered the said draft or order to the plaintiff, and the plaintiff so became the bearer thereof, as in the said first count is mentioned, and at the time when he the said plaintiff took and received the same of and from the said Benjamin Lisle, to wit, on the day and year last aforesaid, he the plaintiff had full knowledge that the said draft or order was so made and delivered by the said defendant to the said Benjamin Lisle for and in respect of the said loan of the said counters by the said Benjamin Lisle to the said defendant, as

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in the third count, was concerning the same amount which is mentioned in the first count, and that, before the making of the draft, the defendant procured of B. L., in a common gambling room in the house of B. L., 500 counters, for the purpose, as B. L. well knew, of illegally playing at French hazard, and that, for securing to B. L. the sum of £500, being the nominal value of the counters, he made the check in the first count mentioned; and that, before B. L. delivered the check to the plaintiff, the latter had full knowledge that it was made in respect of the loan of the counters as before mentioned. Second plea, the like, ex-

hereinbefore in this plea mentioned, and on no other account whatever, and this the said defendant is ready to verify, &c.

Second plea—Exactly similar to the first, to the [‡], and then went on as follows:—And the defendant saith, that the said Benjamin Lisle transferred and delivered the said draft or order to the plaintiff, as in the said first count mentioned, without any consideration whatever for so doing, and for the mere purpose of enabling the said plaintiff to sue him the said defendant upon the said draft or order for the benefit of the said B. Lisle; and that there never was any consideration whatever for the said plaintiff being the holder of the said draft or order, but that he the said plaintiff holds the same, and now sues him the said defendant thereon for the benefit and on behalf of the said B. Lisle, and this the defendant is ready to verify.

And as to the second count of the declaration, the defendant saith, that he did not promise in manner and form as the plaintiff hath above in that behalf complained against him the defendant, and of this he puts himself upon the country &c.

Replication.—The plaintiff as to the plea of defendant, by him first above pleaded to the first and third counts of the said declaration, saith that at the time he took and received the said draft of and from the said Benjamin Lisle, he the plaintiff had no notice of the premises in the said plea mentioned, or any part thereof; and this the plaintiff prays may be inquired of by the country, &c.

And as to the plea of defendant by him secondly above pleaded to the said first and third counts of the said declaration, the plaintiff saith that the said Benjamin Lisle transferred and delivered the said draft or order to the plaintiff, and the plaintiff took and received the same from the said Benjamin Lisle, for a good and sufficient consideration, to wit, to the amount of the said draft or order, and that the plaintiff before and at the time of the commencement of this suit, held and still holds the same for such consideration, and this the plaintiff prays may be inquired of by the country, &c.

cept that instead of stating a knowledge in the plaintiff as to the loan of the counters, there was an allegation that the check was transferred to the plaintiff without consideration, and for the mere purpose of enabling the plaintiff to sue on it for the benefit of B. L. Replication, to the first plea, that the plaintiff had no notice of the premises in that plea mentioned; and to the second plea, that B. L. transferred the check to the plaintiff for a good and sufficient consideration, (concluding to the country).

Erle, for the defendant.—I submit that on these pleadings the plaintiff must begin. In one case it was considered that, on issues like these, the defendant should begin, but that decision has been questioned.

E. Williams, on the same side, referred to the case of *Edmunds* v. *Groves* (*a*).

Lord DENMAN, C. J.—I think that the issues are on the defendant. The defendant must begin.

For the defendant, Mr. *Eden*, the plaintiff's attorney, was called: he said, "I am attorney for the plaintiff, and am also attorney for Mr. Lisle."

Erle.—When did you last see Lisle?

Sir *F. Pollock*, for the plaintiff.—He is the attorney of Lisle, and must not disclose anything affecting his client.

Lord DENMAN, C. J.—I must have the fact of when he saw him last.

The Witness.—"I saw him at my office on Saturday last. I have seen the plaintiff and Lisle together at dif-

(*a*) 2 M. & W. 642. See also the case of *Aston* v. *Perkes*, ante, p. 231, and the notes to that case.

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ferent times—once as lately as within this fortnight or three weeks."

Erle.—Did you ever see this check in Lisle's hands?

Lord DENMAN, C. J.—I think you cannot ask that, as he was Lisle's attorney.

The question was not put.

Verdict for the plaintiff.

Sir *F. Pollock*, and *C. Chadwicke Jones*, for the plaintiff.

Erle, and *E. V. Williams*, for the defendant.

[Attornies—*Eden*, and *Hitchcock & M.*]

COWIE *v.* GOODWIN.

A party actually occupied premises which had been let to him under a written agreement; in the course of his tenancy a nuisance occurred, which put an end to the comfortable occupation of the premises; this nuisance was not remedied by the landlord, and the tenant quitted as soon as he could obtain other premises:—*Held*, that he was not liable to rent for the period between the time of the occurrence of the nuisance and that at which he quitted the premises.

USE and occupation.—The defendant occupied certain apartments in a house belonging to the plaintiff, who held under a lease, and had let the apartments to the defendant by an agreement. The plaintiff's lease expired at Michaelmas, 1839, and in March preceding the plaintiff had given the defendant notice to quit at that period. The defendant had made repeated complaints of the bad state in which the premises were in many respects; but on the Sunday before the Midsummer-day, the wall of the privy, which was situated on the ground floor, gave way, and the kitchens were overflowed with the filth, and the water of a pump, which was situated in one of the kitchens, was affected by it, and the use of the kitchens was altogether taken away. The defendant immediately began to look out for fresh premises, but did not remove till nearly six weeks after Midsummer-day. The rent up to Midsummer was paid into Court.

For the plaintiff the agreement was put in evidence, and proof of the actual occupation and payment of rent was given.

For the defendant, the other facts were proved; and it was contended, on the authority of the cases of *Salisbury* v. *Marshall* (*a*), *Edwards* v. *Hetherington* (*b*), and *Collins* v. *Barrow* (*c*), that use and occupation being an action of an equitable nature, could only be maintained in respect of a beneficial occupation; that there had been no such occupation here, and that consequently the plaintiff could not maintain the action; and this case was distinguished from that of *Baker* v. *Holtpzaffel* (*d*).

Hughes, for the plaintiff, in his reply, submitted that the circumstances did not form an answer to a distinct agreement, followed by actual occupation.

Lord DENMAN.—I shall ask the jury whether these premises were unfit for proper and comfortable occupation, and if the defendant had *bonâ fide* quitted the apartments as soon as he could procure others.

The jury having answered both these questions in the affirmative,

The plaintiff elected to be nonsuited (*e*).

Knowles and *Hughes*, for the plaintiff.

C. Clark and *Kennedy*, for the defendant.

[Attornies— ———, and *G. F. Hudson*.]

(*a*) 4 C. & P. 65.
(*b*) 7 D. & R. 117.
(*c*) 1 M. & Rob. 112.
(*d*) 4 Taunt. 45.

(*e*) *Platt*, in *Easter* Term, moved for a new trial for misdirection, but the rule was refused.

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MUDDLE *v.* STRIDE and Others.

Feb. 20th.

In an action against the proprietors of a steam-vessel, to recover compensation for damage done to goods sent by them as carriers, if, on the whole, it be left in doubt what the cause of the injury was, or, if it may as well be attributable to perils of the seas as to negligence, the plaintiff cannot recover;—but if the perils of the seas required that more care should be used in the stowing of the goods on board than was bestowed on them, that will be negligence, for which the owners of the vessel will be answerable.

Whether, in such a case, on the arrival, and detention by foul weather, of the vessel at a place from which the goods could be conveyed by land to their destination, the captain of the vessel is bound to give notice to the consignee of the fact, to enable him, if he think proper, to obtain the goods earlier by sending for them—*Quære?*

THIS was an action against the defendants as representatives of the Margate New Steam Packet Company, to recover compensation for damage sustained by certain goods which they undertook to convey by one of their vessels from London to the plaintiff, who was a silk mercer and draper, carrying on business at Dovor, to which place one of the Company's vessels was in the habit of going. The first count of the declaration stated, that the defendants did not use due care; and the second, that they promised to deliver the goods within a reasonable time, but did not. The defendants pleaded the general issue—not guilty; and also that they never received the goods.

The evidence for the plaintiff shewed that the goods, which were articles of silk and linen, were bought at a Custom-House sale. The person who bought them said that they were in good order, and that he packed them carefully in a three-inch deal packing-case, in which they were taken on board the Royal Adelaide. The vessel left London-Bridge Wharf the same morning as the goods were put on board—viz. a few days before the end of August—and met with very rough weather; and, on her arrival off Dovor, signals were made to inform the captain that it would be dangerous for the vessel to attempt to enter the harbour at Dovor, and, in consequence, she put back, and went to Margate, where she remained. There was not any vessel went from Margate to Dovor until the 4th of September, on which day the goods were sent by the Royal George, another vessel belonging to the defendants. On the packing-case being opened at Dovor, the goods were found to be damaged—part of them were wet, and the packing paper at one side of the case was also wetted, and a very offensive smell issued from the box. The damage done to the goods altogether was estimated at £20.

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MUDDLE v. STRIDE.

At the close of the plaintiff's case, Lord *Denman*, C. J., was inclined to think, that the evidence left it in doubt whether the damage was occasioned by the negligence of the defendants or not. But the jury expressing a wish to hear the defence,

Thesiger, for the defendants, contended, that there was not any negligence on the part of those who had the care of the vessel, but that any damage which happened must have been occasioned by perils of the seas.

The captain and some of the crew were examined as witnesses for the defence, and stated, that the vessel was obliged to return to Margate in consequence of the weather; and that, on her arrival there, the goods were removed from the deck, and put into the cabin, from which they were not removed till they were put on board the Royal George, on the 4th of September. The man who had the care of the goods during the voyage, swore that they were all dry when the vessel arrived at Margate, and, although she shipped several heavy seas, yet the goods were not any of them damaged by water.

Crowder, for the plaintiff, in reply, after referring to Story on Carriers, p. 344 (*a*), and the case of *Golden* v. *Manning* (*b*), contended, that peril of the seas was the only defence which the defendants could set up; and also that they ought, when the vessel arrived at Margate, to have given notice to the plaintiff, in order that he might, if he

(*a*) An American work, entitled "Commentaries on the Law of Bailments, &c., by Jos. Story, LL.D. Dane Professor of Law in Harvard University." In the passage referred to, the author, speaking of the termination of the carrier's risk, says, that if it is his duty to deliver the goods to the consignees at B., then his liability as carrier does not cease by a deposit of them in a warehouse at B.; but he is chargeable for any loss which occurs until an actual delivery to the party.

(*b*) 3 Wils. 429, and 2 W. Black. 916.

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pleased, have sent for the goods himself, and so obtained them earlier.

Lord DENMAN, C. J., (in summing up).—The first count of the declaration states, that the defendants did not use due care; and the second, that they did not deliver the goods within a reasonable time. The defendants have pleaded—first, not guilty, which puts the whole question of negligence in issue; and secondly and thirdly, that they did not receive the goods in the manner mentioned, which is a pure untruth; and I cannot tell why these things should be done—it is quite disgraceful. On the part of the plaintiff it is said, that the only defence is the perils of the seas; and that is true, I think. I do not see any other mode which the defendants have of excusing themselves. I thought at first, at the close of the plaintiff's case, that it was left in doubt as to whether the damage was occasioned by the negligence of the defendants. But you wished the case to proceed, and I am glad that I suffered it to go on. For the question is now set at rest; for the man in whose care the goods were, says that they were quite dry when they arrived at Margate, so that the sea water could not have damaged them. However, the injury appears to me to be of a very mysterious kind. The goods appear to have been injured by some liquid of an offensive character. If you think that was the consequence of any ill-care in the packing of the goods on board the vessel, the defendants will be liable; and even if the perils of the seas required more care in the packing than was bestowed upon them, then the perils of the seas will not be an answer. If, on the whole, in your opinion, it is left in doubt what the cause of the damage was, then the defendants will be entitled to your verdict; because you are to see clearly that they were guilty of negligence before you can find your verdict against them. If it turns out, in the consideration of the case, that the injury may as well be

attributable to the one cause as the other, then also the defendants will not be liable for negligence. With respect to the detention of the goods at Margate, I think, perhaps, it would have been as well if the defendants, when the vessel arrived there, had communicated to the plaintiff that the goods were there, as possibly he might not have been willing that they should remain so long a time. But that seems to me to be a very minute circumstance in the case. However, if you think that any damage was sustained in consequence, you may give it. On the whole, you will say, whether the goods were damaged from the want of due care on the part of the defendants, and whether there was a detention of them for an unreasonable time.

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MUDDLE *v.* STRIDE.

Verdict for the plaintiff—Damages £20.

Crowder and *E. James*, for the plaintiff.

Thesiger and *Bodkin*, for the defendant.

[Attornies—*Shrewsbury* and *Cook & F.*]

Second Sitting at Westminster in Trinity Term, 1840.

BEFORE MR. JUSTICE COLERIDGE.

LORD CAMOYS *v.* SCURR, Clerk.

June 2nd.

A horse being for sale, A. asked the agent of the vendor to let him have the horse for the purpose of trying it, and the agent did so:—*Held*, that A. was entitled to put a competent person on the horse for the purpose of trying it, and was not limited to merely trying it himself.

CASE.—The first count of the declaration stated, that plaintiff "heretofore, to wit, &c. on &c., at the request of

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the defendant, delivered to the defendant, and the defendant at his request had the care and custody of a certain mare of the plaintiff, of great value, to wit, of the value of £100, for the purpose of the defendant riding and trying the same; and thereupon it then became and was the duty of the defendant, whilst he had the said mare for the purpose aforesaid, to take due and proper care of the same: yet the defendant, not regarding his duty in that behalf, whilst he so had the said mare for the purpose aforesaid, to wit, on the day and year aforesaid, took so little and such bad and improper care thereof, that by reason of the defendant's carelessness and improper conduct in that behalf, the said mare was injured and died." The declaration contained also a count in trover. Pleas—1st, to the whole declaration, not guilty; 2nd, to the first count, "that the plaintiff did not deliver to the defendant, nor had the defendant the care and custody of the said mare in the said first count mentioned in manner and form as in the said first count is alleged;" (concluding to the country). 3rd plea, to the last count, "that the defendant committed the alleged grievance in the said last count mentioned, by the leave and license of the plaintiff to him for that purpose first given and granted;" (concluding with a verification). Replication denying the license.

It was opened by *Kelly*, for the plaintiff, that the mare was placed in the hands of Mr. Shackel for the purpose of being sold, and that the defendant, who appeared to like the mare, asked permission to have a trial of her, which was granted, and the defendant having received possession of the mare, not only tried her himself, but put another person's servant on the mare, and whilst the servant was riding her, the mare was injured, and afterwards died of the injuries she received. He submitted that a person who had a mare on trial, had no right to put any other person

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on her back; and that if he did, it was such a conversion as would make him liable to the owner in an action of trover. He cited the case of *Bringloe* v. *Morrice* (*a*).

It was proved by Mr. Shackel that he gave the mare into the possession of the defendant, for him to have her for the purpose of trying her. It was admitted that the mare received injuries, of which she died, while she was thus lent to the defendant.

It was opened by *Platt*, for the defendant, that when the defendant had himself tried the mare for a short time, he desired Robert Hobart, who was a very excellent horseman, and who was the groom of General Dyson, to mount the mare and try her in Hyde Park; and that on Hobart riding her down the drive on the east side of the park the mare ran away with him, and struck herself against an iron post near Hyde Park Corner, by which the mare received injuries of which she died, the groom Hobart also receiving very severe injuries. Upon these facts it was submitted, that the defendant was entitled to a verdict, as he had a right to put a person of competent skill on the back of the mare for the purpose of trying her.

Evidence was given which proved the facts opened for the defendant.

(*a*) 1 Mod. 210. This was an action of trespass for immoderately riding the plaintiff's mare. The defendant pleaded that the plaintiff lent him the mare, and gave him license to ride her, and that by virtue of this license the defendant and his servant had ridden the mare alternately. The plaintiff demurred to the plea. "Per Curiam.—The license is annexed to the person, and cannot be communicated to another, for this riding is matter of pleasure. *North* took a difference where certain time is limited for the loan of the horse, and where not. In the first case, the party to whom the horse is lent hath an interest in the horse during that time, and in that case his servant may ride; but in the other case not; a difference was taken betwixt hiring a horse to go to York, and borrowing a horse; in the first place the party may set his servant up, in the second not."

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COLERIDGE, J.—The defendant had this mare for the purpose of trying her, and I think that he was entitled to put a competent person on the mare to try her. I shall leave it to the jury to say, whether the groom of General Dyson was a competent person, and whether he rode the mare only for the purpose of trying her. On the part of the plaintiff it has been argued, that the defendant was guilty of a conversion; but if no accident at all had happened, could it be said that putting the groom on the mare to try her was such a conversion as would make the defendant liable in an action of trover? The only question of fact is, whether the defendant did any more than was necessary for the purpose of trying the mare.

Kelly, for the plaintiff, elected to be nonsuited.

Nonsuit.

Kelly and *Humfrey*, for the plaintiff.

Platt and *Petersdorff*, for the defendant.

[Attornies—*Barrett & Eyston* and *Holland*.]

On a subsequent day *Kelly* applied to the Court to set aside the nonsuit, on the ground that the defendant had no right to allow the groom Hobart to ride the mare for him; but the Court refused a rule.

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NORFOLK CIRCUIT.

HUNTINGDON ASSIZES.

BEFORE MR. BARON PARKE.

REGINA *v.* BARRATT and MAYLE.

ABDUCTION.—The prisoner Barratt was indicted on the stat. 9 Geo. 4, c. 31, s. 19, for having "feloniously and from motives of lucre," taken away and detained Maria Ellis against her will, she having a future interest in certain personal estate, "with intent her the said Maria Ellis to marry." The indictment also charged an intent to defile. The prisoner Mayle was charged as an accessory before the fact.

On an indictment for abduction on the stat. 9 Geo. 4, c. 31, s. 19, the jury ought not to convict the prisoner, unless they are satisfied that the prisoner committed the offence from motives of lucre; but evidence of expressions used by the prisoner respecting the property of the lady, such as his stating that he had seen the will of one of her relatives, (naming him), and that she would have £220 a-year, are important for the consideration of the jury in coming to a conclusion whether the prisoner was actuated by motives of lucre or not.

It appeared from the evidence of Miss Ellis, (who was about seventeen years of age), that the prisoner was a music master, and that she had first known him in the year 1838, when he taught her music at a school kept by Mrs. Wilson at Stamford; soon after which time he paid his addresses to her, which were favourably received by her, but which her relatives insisted on her breaking

If the jury should not be satisfied that the prisoner was actuated by motives of lucre, and they be satisfied that the prisoner used force to the person of the lady in taking her away, and that he took her away against her consent, they may convict him of an assault under the stat. 1 Vict. c. 85, s. 11.

A prisoner was taken into custody at the house of his brother on a charge of abduction. When he was taken, a letter was found in a writing-desk in the room in which he and his brother were. The letter was directed to a person in the neighbourhood of the prisoner's late residence. The police-officer was going to open it, when the prisoner told him it had nothing to do with the business that he had come about:—*Held*, that the letter was receivable in evidence on the trial of the prisoner for the abduction.

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off. It further appeared that Miss Ellis was sent to a school at Somersham, in Huntingdonshire, kept by Miss Pocock, where the prisoner, at the beginning of the year 1840, had an interview with her, which being discovered by Miss Ellis's friends, she, by their direction, wrote the prisoner a letter, of which the following is a copy :—

" Somersham, Feb. 10, 1840.

" Dear Sir,—By the earnest entreaty and advice of my friends, and from my own conviction of its being the right path for me to pursue, I am induced to write to you to say our correspondence and intimacy must now cease for ever. You are well aware that it has always been contrary to the wishes of my friends and best advisers; and my own judgment tells me that I could have no happiness in living under their displeasure. Their firm determination, I find, is to discard me entirely from their homes and affections; they have left me but two alternatives, and it would make me miserable to be unfriendly with my nearest and dearest relatives. I hope you will consider this decisive, for I am firmly resolved to abide by my present determination; and remain your's &c.

" MARIA ELLIS."

It further appeared that about the 20th of February a letter was written in pencil by Miss Ellis to the prisoner, of which the following is a copy :—

" Somersham, Feb.

" My dear Mr. Barratt,—If I may be allowed to address you so familiarly, for 'sir' is so very cold—in fact, I cannot bear it—perhaps when you see the signature of this letter you will be inclined to throw it away without reading it; but I must beg your attention for a few minutes, though I well know I do not deserve it, even for a moment. The reason I trouble you is because I wish you to know all, and with the hopes that you will then not blame me so much.

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"When you came to Somersham, you no doubt recollect a person passing through the yard; it was an old servant of Miss Pocock's; she recognised me, and two days after the school commenced she told Miss P., who, of course, told me she knew, and that they intended to write to my friends, whom I received a letter from some days after, with nearly these words, saying that they left me my choice, my own dear friends and home, or to continue my acquaintance with you; if so, they intended to banish me for ever from their home. Now you well know it was impossible for me to do that as I am so young; if I had been older I should have acted very differently. I need hardly add, that it has caused me more unhappy hours than I hope I shall ever have again; but I am sure I shall not, at least on that point, for it is my full determination never to marry. Perhaps you may smile, but I can assure you I am sincere; and, though this is the last time I shall ever address you, think not that I can ever forget one whom I so highly esteem. If possible, you will be more in my thoughts than before, and to GOD, who alone knows my heart, my prayers will always be offered up for your happiness and welfare; and I hope, with His assistance, I shall be able to bear all this with fortitude.

"Oh! what a blessing it would have been, both to you and I, if Mrs. Newberry had acted rightly when she knew, which I know she did, to have spoken about it, for I shall partly blame her for blighting my future happiness. I have one favour to ask you, which I hope you will comply with, as it will be the last, perhaps, for ever, that is, that you will never pass me in Peterborough or any other place you may meet me in without speaking to me. This may be an improper request, but if you did, no words can express my feelings. I think it would almost kill me. I must beg of you to excuse this being written in pencil, for I dare not be seen with a pen and ink in my hands. I have nothing more to add, except that I hope you will accept my best wishes for yourself and dear friends, and

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believe me to remain now and always your very sincere friend,

"MARIA ELLIS."

"P. S.—Miss P. forced me to send your letter back. I mention it, for perhaps you thought it unkind. Farewell, and may the ALMIGHTY watch over you."

It further appeared, that on the 3rd of March, 1840, Miss Ellis was walking out with her schoolfellows, when she saw the prisoner and another person in a gig, and almost immediately afterwards the prisoner came behind her, and, having placed his hand on her shoulder, carried her in his arms to the gig, she struggling and screaming all the time as he was doing so. It was proved that the two prisoners took her in the gig to St. Ives, where the prisoner Mayle got out, and the prisoner Barratt alone took Miss Ellis to an inn at Huntingdon, from which they proceeded in a post-chaise to Thrapstone, and thence in another chaise to Wellingborough; and it was proved by Miss Ellis that during this part of the journey the prisoner Barratt took out a pistol and threatened to shoot himself. It further appeared, that the parties proceeded in another chaise to the railway station at Weedon, at which place the brother of Miss Ellis came up and took her away from the prisoner Barratt.

From the cross-examination of Miss Ellis it appeared, that at an early part of her acquaintance with the prisoner Barratt she had offered him a pair of white gloves, which he declined accepting, and that she had worked him a pair of slippers, and asked for a lock of his hair, and that she had accepted a ring from him, which she had in her possession at the time of the trial, and that during the time of her residence at Mrs. Wilson's, she, with the other pupils of that lady, had gone to the theatre to see a conjuror named Festo, and that the theatre being darkened to give effect to the performance, the prisoner

Barratt attempted to kiss her, and sat with his arm round her waist for some time, of which she never complained to Mrs. Wilson, although she mentioned it to some of her schoolfellows on the next day. Miss Ellis was also cross-examined, with a view of shewing that she had consented to the abduction.

Evidence was given to shew that Miss Ellis would, on her attaining the age of twenty-one, be entitled to a sum of £2100, under the will of the late Mr. Whitwell; and it was also proved that the prisoner had said that he had seen the will of Mr. Whitwell, and that he knew Miss Ellis would be entitled to £220 a-year.

It was proved by a police-officer that he apprehended the prisoner in London at his brother's house, to which place he had gone after Miss Ellis had been taken away from him. The police-officer stated, that when he took the prisoner into custody, he found a letter in a desk in the room where both the prisoner and his brother were, which letter was directed to a person in the neighbourhood of the prisoner's late residence. The witness, on finding the letter, was about to open it, when the prisoner told him it had nothing to do with the business that he had come about. The officer opened the letter, and it was now offered in evidence on the part of the prosecution.

J. Sydney Taylor and *Gunning*, for the prisoner, objected to the letter being received in evidence, on the ground that it was neither proved to be in the hand-writing of the prisoner, nor had it been found in his possession. It was conceded that written documents found npon persons, though not proved to be written by them or by their direction, might be received in evidence as facts in the case, but there was no case that went the length of saying that a written paper not traced to the prisoner's possession, nor proved to be in his hand-writing, but which happened to be found in the house of a third person where he was arrested, was admissible in evidence.

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PARKE, B.—I am of opinion that the letter is receivable in evidence, on the ground that the prisoner has made a statement in reference to it which shews that he was cognizant of its contents, which raises the presumption that it was written by his direction. If the letter has really nothing to do with the charge against the prisoner, its production cannot strengthen the case for the prosecution; but if it has, then the contents of a written paper so found, and connected as this is with what the prisoner said on his apprehension, is matter of consideration for the jury.

The letter was given in evidence. It contained directions to the person to whom it was addressed, to forward to London the prisoner's luggage, as he intended to proceed to Calais to keep out of the way, in consequence of an attempt which he had made to carry off the prosecutrix, and for which it stated that he feared he could be transported.

There was no evidence against Mayle as an accessory before the fact.

J. Sydney Taylor addressed the jury for the prisoner Barratt.—Even if Miss Ellis was neither directly nor indirectly a consenting party to her own abduction, there is no proof that the prisoner was actuated by motives of lucre. If the prisoner carried off this lady even against her own consent, and was instigated to do so by the natural desire of an ardent unreflecting lover to rescue her from the condition of constraint in which she was placed, and to make her his wife from affection to her person, and did not seize her person as the means of getting at her property, I submit, in point of law, the charge of felony cannot be sustained. The policy of the law was to prevent the practices of cold and heartless speculators, who, without having the slightest feeling of affection for a female entitled to some present or future interest in real or personal property, and, perhaps, having no previous intimacy with the person marked

out as the victim of their cupidity, deliberately planned the getting possession of the object of their schemes, either by force or fraud, in order to obtain the property, on which alone they had fixed their affections. In the present case it is evident that the attachment was mutual, and that the prisoner was passionately fond of the young lady; to insure an honourable union with whom he had encountered all these perils. Look at the letters, and consider whether such language from a beloved object, supposed to be in a state of, at least, moral coercion and captivity, was not sufficient to prompt and impel the prisoner to take the violent step which he did to rescue a devoted girl, and place her beyond the reach of those whose interference had made her miserable and him desperate, without his being in the slightest degree influenced by the sordid and base motive of lucre, which the indictment alleges. In the case of *Rex* v. *Wakefield*, (which occasioned the present enactments on this subject, as an amendment of the old law), the circumstances were very different. In that case the parties had no previous intimacy; and therefore all inducement to the act arising from real passion and affection was out of the question; and the abduction in that instance, as well as almost every other which has been the subject of penal inquiry, could be accounted for on no other grounds than those of cold and sordid calculation, to get possession of a lady's property by first obtaining possession of her person.

PARKE, B., (in summing up).—I agree with the learned counsel for the prisoner, that there is a great distinction between this case and the case of *Rex* v. *Wakefield*, as there was not in that case any previous intimacy between the parties. I also agree with him as to his argument, that if all the other requisites of the statute constituting the offence are satisfied, and the evidence of the motive being the base and sordid one of lucre is unsatisfactory or insufficient, it will be your duty to acquit the prisoner of

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the charge of felony. It is clearly made out that Miss Ellis is entitled to personal property, and that the prisoner took her away with the intention of marrying her; and I think that the other intent may be entirely laid out of your consideration, as there is no evidence of it whatever. You will therefore say whether, the prosecutrix being a lady entitled to property, the prisoner either took her away or detained her against her will, with the intent of marrying her, but for the base purpose of getting possession of her property; and if you come to the conclusion that that was so, it will be your duty to find him guilty of the felony. With respect to the motives of the prisoner, evidence has been given of expressions used by the prisoner respecting the property of Miss Ellis, such as his having told one of the witnesses that he had seen Mr. Whitwell's will, and that she would be entitled to £200 a-year. These expressions are important for you to consider, in order to your forming a judgment whether the prisoner was actuated by motives of lucre or not. Unless you are satisfied that such a motive prompted him to take away the prosecutrix against her will, he is entitled to be acquitted of the felony; and you will then consider whether he used any force to her person in taking her away, and took her away against her consent; for if he did, and he is not guilty of the felony, you may, under the present indictment, convict him of the assault (*a*).

Verdict—Guilty of the assault.

B. Andrews and *Byles*, for the prosecution.

J. Sydney Taylor and *Gunning*, for the prisoner.

[Attornies—*Gates* and *Barratt & Hunnybun*.]

(*a*) Under the stat. 1 Vict. c. 85, s. 11, referred to *ante*, Vol. 8, p. 243, n. (*b*).

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WESTERN SPRING CIRCUIT, 1840.

BEFORE MR. JUSTICE COLTMAN AND MR. BARON ROLFE.

TAUNTON ASSIZES.

BEFORE MR. JUSTICE COLTMAN.

REGINA *v.* PERKINS.

MURDER.—The prisoner was indicted for the murder of Charles Lock, by shooting him with a gun.

It appeared, that on the 28th of March, 1840, the deceased received a severe wound from a gun loaded with shot, of which wound he died at five o'clock the next morning. The deceased, who was ten years old at the preceding Michaelmas, made certain statements, after he had been wounded, and it was proposed to give these statements in evidence as declarations in articulo mortis.

To shew the state of the child at the time when the statements were made, which was in the evening of the 28th of March, two surgeons were examined, Mr. Charles Moore Collins, and his father, Mr. Charles Palk Collins.

Mr. Charles Moore Collins said, "I was of opinion the boy could not survive many days. I said to him, 'My good boy, you must know you are now labouring under a very severe injury, which in all probability you will not recover from, and the effects of it will most likely kill you.' My father asked him if he was perfectly conscious where he should go if he told a lie, and where he should expect to go if he told the truth on the subject. In answer to the first he said he should expect to go to hell, and

A boy between 10 and 11 years of age was mortally wounded, and died the next day. On the evening of the day on which he was wounded, he was told by a surgeon that he could not recover. The boy made no reply, but appeared dejected. It appeared from his answers to questions put to him that he was aware that he would be punished hereafter if he said what was untrue:—*Held*, that a declaration made by him at this time was receivable in evidence on the trial of a person for killing him, as being a declaration in articulo mortis.

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to the latter, he should go to heaven. My father said nearly similar words to what I said myself. When he was told that he was not likely to recover, I could see a change in the expression of his countenance. The appearance of tears came into his eyes, and an appearance such as it is difficult to describe—an appearance of distress; but he said nothing, that I can remember, expressing either assent or dissent. My father did say to the deceased, 'you may recover, though in all probability you will not.'"

Mr. Charles Palk Collins:—"I was present on the evening of the 28th. I said to the deceased, after feeling his pulse, and examining the wound, 'My little man, you appear to me to be much more sensible than from the nature of the accident you have received I should have expected. It is impossible for me to say whether you may survive the injury or not. I think it more than probable you may be dead before morning.' I then asked him if he was aware of the nature of an oath. He made no reply. I then said, 'If you don't tell the truth, and how this accident occurred, where do you expect to go?' He then said, 'to hell.' If you do speak the truth, I suppose you expect to go to heaven? He made no reply. I then told him, 'I put these questions to you, that in case of your death, the truth of the accident may be ascertained,' or words to that effect. I don't think he made any reply. He expressed no opinion as to his state. After that he made a statement, which I took down in writing."

On cross-examination this witness said, "I said 'you may recover; it is impossible for me to say; but I don't think it likely you will be alive by the morning.'" This witness also said further, that the child appeared at the time in a very debilitated state from the injury, but that he appeared to be a very quick, intelligent child. The witness also stated that he had known the child before the accident.

Bere, for the prisoner, objected that the statements

made by the deceased were not receivable in evidence—1st, because it did not sufficiently appear that the deceased was without any hope of recovery; and, 2ndly, that as the deceased was under fourteen years of age, they were not receivable unless the deceased was aware of the obligation of an oath.

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COLTMAN, J., received the statements in evidence, reserving the question as to their admissibility.

Verdict—Guilty of manslaughter.

Carroll for the prosecution.

Bere for the prisoner.

[Attornies—*Brown*, and *Leigh & Warden*.]

BEFORE LORD DENMAN, C. J.; TINDAL, C. J.; LORD ABINGER, C. B.; LITTLEDALE, J.; PARKE, B.; BOSANQUET, J.; ALDERSON, B.; PATTESON, J.; WILLIAMS, J.; COLERIDGE, J.; COLTMAN, J.; ERSKINE, J.; AND ROLFE, B.

May 2nd.

Bere, for the prisoner.—The question is, whether the statements of the deceased were receivable in evidence as declarations in articulo mortis. It was proved that one of the surgeons told the deceased that he might recover, though he (the surgeon) thought he would not, and that the deceased himself did not say anything. To render a statement receivable, the learned judge must be satisfied either from the expressions used by the deceased, or from the surrounding circumstances, that the deceased at the time of making the declaration, was without any, even the

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slightest, hope of recovery. This appears from the cases of *Rex* v. *Spilsbury* (*a*), *Rex* v. *Van Butchell* (*b*), *Rex* v. *Wellbourn* (*c*), *Rex* v. *Christie* (*d*), *Rex* v. *Mosley* (*e*), *Rex* v. *Crocket* (*f*), *Rex* v. *Hayward* (*g*), *Rex* v. *Bonner* (*h*), and *Rex* v. *Fagent* (*i*).

ALDERSON, B.—*Simpson's case* (*k*) is contrary to the decision of my Brother *Gaselee* in *Rex* v. *Fagent*, as in that case the deceased got better, and Mr. Justice *Bayley* received the evidence.

Lord DENMAN, C. J.—It might be that the latter part of the evidence in *Rex* v. *Fagent* threw a light upon, and explained the other part.

Bere.—There was also a case at Exeter before Mr. Justice *Coleridge*, of a music-master, who was tried for the murder of his wife, by cutting her throat. It appeared that the medical man had no time after the woman was wounded to tell her of her danger, and that she said something, and died within a quarter of an hour; and the learned Judge would not receive evidence of the statement she had made, because neither the medical man had told her of her danger, nor had she expressed anything on the subject. There is also another objection, which is, that the declaration is not admissible, even if it were in articulo mortis, because the deceased was only ten years and some months old; and I submit, that unless there be some evidence that the deceased was acquainted with the nature

(*a*) Ante, Vol. 7, p. 187.
(*b*) Ante, Vol. 3, p. 629.
(*c*) 1 Ea. P. C. 358.
(*d*) Carr. Supp. 232, and 2 Russ. C. & M. 685.
(*e*) M. C. C. 97.
(*f*) Ante, Vol. 4, p. 544.
(*g*) Ante, Vol. 6, p. 157.
(*h*) Id. 386.
(*i*) Ante, Vol. 7, p. 238.
(*k*) 1 Lewin's C. C. 78. See also the case of *Reg.* v. *Baltye*, post.

of an oath his declaration in articulo mortis is not receivable.

ALDERSON, B.—The deceased says he expects to be punished hereafter, if he does not tell the truth.

Bere.—The surgeons differ as to the expressions used. The only analogous cases I can find are those relating to the time at which children can commit crime; and the rules on that subject may afford a criterion as to the time at which the law presumes a child to know right from wrong. A child under seven years old cannot commit a crime, and between seven and fourteen a child is presumed to be incapable till the contrary appears. Lord *Coke* says (*a*), "In criminal cases, as felony, &c., the act and wrong of a madman shall not be imputed to him, for that in those causes actus non facit reum nisi mens sit rea, and he is amens, (id est) sine mente, without his mind or discretion, and furiosus solo furore punitur; a madman is only punished by his madness; and so it is of an infant until he be of the age of fourteen, which in law is accounted the age of discretion."

ALDERSON, B.—All this would go to shew that a child under seven could not be examined at all.

PARKE, B.—There is no rule as to the age of children to be examined as witnesses. A child, who has sufficient knowledge, may be examined. With a child of ten years old all this speculation would not be gone into.

Bere.—In the case of *Rex* v. *Pike* (*b*), a declaration made in articulo mortis by a child four years old was rejected, on the ground that a child of that age could not have had

(*a*) 1 Inst. 247 b.

(*b*) Ante, Vol. 3, p. 598.

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that idea of a future state which is necessary to make such a declaration admissible.

ALDERSON, B.—There was no evidence of the capacity of the child.

Bere.—Nor is there here.

ALDERSON, B.—I think there is.

Bere—In the case of *Rex* v. *Travis* (*a*), a child between six and seven years of age was not allowed to be examined, and the case proceeded on the ground that children of so tender years cannot be presumed to know right from wrong, so as to be admitted as witnesses; and in the case of *Rex* v. *Owen* (*b*), Mr. Justice *Littledale* states, that the age of fourteen is the age at which the presumption of law arises that a person is capable of judging of what is wrong. I therefore submit, that to render a declaration of this kind admissible the Judge must be satisfied that the party making it had not even the slightest hope of recovery; and if the party making the declaration was under fourteen years of age the Judge must also be satisfied that the party was aware of the obligation of an oath.

The case was considered by the Judges, who held that the declarations of the deceased were properly receivable in evidence, and that the conviction was right.

(*a*) 1 Str. 700. (*b*) Ante, Vol. 4, p. 236.

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WELSH SPRING CIRCUIT, 1840.

BEAUMARIS ASSIZES.

BEFORE MR. JUSTICE WILLIAMS.

REGINA *v.* JONES.

MISDEMEANOR.—The first count of the indictment charged that Hugh Wynn, Esq., was coroner of the county of Anglesey, and that a coroner's inquest taken before him had found Hugh Roberts guilty of the manslaughter of his wife, (reciting the inquisition), and that the coroner bound over Anne Owen to prosecute at the next assizes for the county of Anglesey; that she did appear at the assize held before Mr. Justice *Vaughan* on her recognisance to prosecute, and did prosecute Hugh Roberts on the 25th of July, 1838, (reciting the indictment which was preferred, which was for murder); and that, upon the request of Anne Owen, the Court, at the assizes, did order that the treasurer of the county of Anglesey should forthwith pay unto the said Anne Owen, or her order, a certain sum, to wit, the sum of 86*l.* 18*s.* 6*d.*, for so prosecuting the said Hugh Roberts for murder and manslaughter; and that the said order was then and there forthwith, by one John Lloyd, clerk of assize, he being the proper officer of the Court in that behalf, made out upon and directed to the treasurer of the county, and delivered to Anne Owen; and

The quarter sessions of a county made regulations as to the expenses to be allowed in cases of felony, and by one of them directed that the taxed bill of costs should be annexed to the order for their payment. These regulations were confirmed by a Judge under the stat. 7 Geo. 4, c. 64, s. 26. In a case of felony the clerk of assize made out the items of the costs allowed, and on the other half of the same sheet of paper wrote the order for payment of their amount. The attorney for the prosecution tore off the first half of the paper, which contained the items, and presented the other half to the county treasurer for payment. The treasurer refused to pay:—*Held*, that, on account of the mutilation of the order the treasurer was not indictable for this refusal.

Where a Queen's counsel was instructed to argue a criminal case for a defendant on a point reserved for the consideration of the fifteen Judges, but at the time fixed for the argument had not obtained a license from her Majesty to argue against the Crown, but only a certificate from the Secretary of State's office, the Court directed the argument to stand over for such license to be obtained.

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that the defendant, then being treasurer of the county, had sight of the order, and was then and there served with a copy of the same, and requested to pay the same; and it was averred that the place where the offence of Hugh Roberts was supposed to have been committed was contributing to the county-rate, and that the defendant unlawfully, wilfully, and obstinately neglected and refused to pay the sum mentioned in the said order, or any part, contrary to the said order and the form of the statute, &c.

The second count was nearly similar to the first, but omitted the allegation respecting the coroner's inquest.

The third count was similar, but stated that Anne Owen appeared on subpœna, instead of stating that she was bound by recognisance.

The fourth count merely stated the substance of the order, and charged that the defendant disobeyed it.

This indictment was preferred against the defendant as treasurer of the county of Anglesey, the alleged offence being the refusal of the defendant to pay the sum of money specified in the following order.

"At the Anglesey Summer Assizes, 1838:—The Court doth order the treasurer of the county of Anglesey, forthwith to pay to Anne Owen, or her order, the sum of 86*l.* 18*s.* 6*d.*, for prosecuting Hugh Roberts for murder and manslaughter. For doing which, this shall be the said treasurer's warrant. By the Court.

"J. LLOYD, Clerk of Assize."

It appeared, that at a General Quarter Sessions of the peace, held at Beaumaris, for the county of Anglesey, on the 3rd of April, 1838, certain regulations were established as to the rate of costs and expenses to be allowed to prosecutors, under the stat. 7 Geo. 4, c. 64, s. 26, which regulations having, on the 12th of April following, received the approbation and signature of a Judge, according to the statute, are by that section declared to be "binding upon all persons whatsoever."

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Amongst these regulations there was one to the following effect:—"That, in all cases, the taxed bill of costs and the justice's certificate of costs before trial be attached to the warrant of the taxing officer, and be delivered with it to the county treasurer."

It appeared in evidence, that the usual course and practice in making out orders or warrants upon the treasurer, was in conformity with the last-mentioned regulation; and it was proved, that these orders are usually made out upon a sheet of paper, and that upon one side is the order upon the treasurer, in the form before set forth, and upon the other are specified the several items composing the amount for which the demand is made upon the treasurer; and that in this case such form had been observed. It further appeared that the attorney of Anne Owen, having received the order in question, in the state above described, tore off the half sheet which contained the particulars of the several charges, and *presented that half sheet only* which contained the order or warrant above set forth to the defendant, who *for that cause* refused to pay the same.

Townsend and *W. Yardley*, for the defendant, submitted, first, that the magistrates at the quarter sessions had power to make the regulation above set forth, and that it having received the sanction of the Judge, according to the statute, it was "binding upon all persons whatsoever;" and secondly, that even if that were not so, the defendant, as treasurer, was not bound to obey a mutilated document.

Jervis and *Welsby*, for the Crown.—The magistrates have exceeded their authority in making this regulation. Their power only extends to regulating the *rate* of costs and expenses. The order, as it is, is a perfect order made by the officer of the Court on the treasurer, which the treasurer is bound to obey; and if the treasurer be thus ordered to pay a certain amount, he has no right to inquire

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as to the way in which the officer of the Court has arrived at that amount.

WILLIAMS, J., reserved the points for the opinion of the fifteen Judges.

Verdict—Guilty, subject to the points reserved.

Jervis and *Welsby*, for the prosecution.

Townsend and *W. Yardley*, for the defendant.

[Attornies—*Lloyd Roberts*, and *Jones*.]

The case was to have been argued before the Judges in Easter Term, 1840; but it being stated by *C. Cresswell*, who was instructed to argue for the defendant, that he had not obtained a license from her Majesty under the royal sign manual, to argue against the Crown, and that he had only received a certificate from the Secretary of State's office, the Judges directed the case to stand over till Trinity Term, that her Majesty's license might be obtained (*a*).

(*a*) The Attorney and Solicitor-General, a Queen's Serjeant, or a Queen's Counsel, cannot appear in a case against the Crown (even if the Crown be a nominal party only) without a license under her Majesty's sign manual. To obtain this license, a petition is presented to her Majesty. This petition is left at the Secretary of State's office, and a sum of 1*l*. 10*s*. paid, on which a certificate is given; and the license is then prepared, to which her Majesty's sign manual is obtained. The form of the petition is given in Gude's Cr. Office Practice, Vol. 2, p. 599, and the form of the license, Id. 390. Serjeants and Counsel, who have patents of precedency, may appear in cases against the Crown without any such license.

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BEFORE LORD DENMAN, C. J.; TINDAL, C. J.; LITTLEDALE, J.; ALDERSON, B.; PATTESON, J.; WILLIAMS, J.; GURNEY, B.; COLTMAN, J.; ERSKINE, J.; MAULE, J.; AND ROLFE, B.

C. Cresswell, for the defendant.—This is not such an order as the treasurer was bound to obey. By the stat. 12 Geo. 2, c. 29, s. 7, the treasurers of counties are to deliver in at the quarter sessions, exact accounts of all monies paid by them, "and to lay before the justices at such sessions, the proper vouchers for the same." By the stat. 7 Geo. 4, c. 4, s. 26, the justices at the quarter sessions are empowered to make regulations as to the rate of expenses in cases of felony. It is said on the other side that this merely empowers them to fix a *scale* of charges; but I submit that it does more, and that they have power to regulate the way in which those costs shall be demanded. It is said that the treasurer has no right to inquire into the items. But if the taxing officer had allowed more than the justices directed to be allowed by the regulations, would the treasurer be indictable if he did not pay the amount ordered by the taxing officer? *June 6th.*

ALDERSON, B.—How can the treasurer know that the regulations are complied with, unless he sees the items?

TINDAL, C. J.—There seems to be no use in tearing off half the paper.

GURNEY, B.—The figures on the first half of the paper may be most important. In a case before my Brother *Coleridge,* in the Bail Court, yesterday, it was imputed that a person had in a case of this kind falsified the items to a large amount, and got payment on an order for the total.

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C. Cresswell.—The attorney might falsify the facts and get too large an allowance, and then, having an order for the gross amount, he might burn the statement containing the false items. I submit, also, that as the whole was written by the taxing officer on one sheet of paper, the whole was one instrument, of which the bill of items formed a part; and that the order not being perfect without the bill on the other half sheet, the attorney for the prosecution presented only a part of the order. This is a regulation made with a view that the county should not pay more than is allowed by the scale of charges. If the treasurer disobeyed the order of the sessions approved by the Judge, he might be indicted. The treasurer had a right to see the whole of the document, and was not bound to obey a part of it.

Jervis, for the Crown.—The real question is, whether the quarter sessions, by importing into their regulations a term which they had no right to import into them, can be a court of appeal over the taxing officer of the assizes, who for this purpose is the Court. It is said on the other side that they have a power to annex conditions to the scale of expenses. The stat. 12 Geo. 2, c. 29, (the county rate act) does not apply. By the 22nd section of the stat. 7 Geo. 4, c. 64, costs are to be allowed to prosecutors and witnesses in cases of felony; and the 24th section directs that the order shall be delivered out, and by that section the treasurer is "required" "upon sight of every such order forthwith to pay the person named therein, or to any one authorized to receive the same on his or her behalf, the amount in such order mentioned, and shall be allowed the same in his accounts." The clerk of assize is bound by the scale of charges regulated under the 26th section, but the treasurer is bound on sight of the order to pay the amount specified in it; and it is to be presumed that the taxing officer has taxed according to the scale. The treasurer refused to pay here, because the bill of items was

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taken off; he might in another case refuse because the justice's certificate was not annexed, and yet that is the only voucher the attorney has for the expenses before the committing magistrate. In practice the attorney never makes out a bill for the clerk of assize to tax; and the practice is for the clerk of assize to have the brief handed to him, and then look at the back of the indictment to see who the witnesses were, and on doing this he gives his order for the costs. I submit that the quarter sessions may (subject to the approbation of the Judge) regulate the rate of costs, but not the manner in which they are to be paid. Can the sessions review a taxation made at the assizes? Can they say you have allowed a farmer who was a witness 3*s.* 6*d.* a-day instead of 1*s.* 6*d.*, according to our scale? If the sum allowed was too large, the treasurer might have asked a review of the taxation, or might have taken out a summons to shew cause why a bill should not be delivered. The annexing of the magistrate's certificate or the bill of items could be of no use, as the order is that which the treasurer is bound to obey.

GURNEY, B.—The officer made out this paper in the proper form.

C. Cresswell, in reply.—How can a party tear off one half of the document and present the other, and then indict the treasurer for disobedience? The whole is the order made out by the clerk of assize. The attorney makes out no bill.

Jervis.—He is deprived of the magistrate's certificate.

ERSKINE, J.—Which is of no use to him after the taxing officer allows it.

C. Cresswell.—Mr. Jervis says, "Suppose that the items were annexed, and the taxing officer allowed more than

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he ought according to the scale, that could not make any difference." But, I would ask, how could an order, bad on the face of it, be enforced by indictment? The treasurer has a right to see the paper in the same state in which it was originally issued by the officer of the Court; and if this conviction is supported, it will defeat a regulation which tends to prevent abuses.

The case was considered by the Judges, who held the conviction wrong, their Lordships being of opinion that the defendant, as treasurer, was not bound to obey the order in the state in which it was presented to him, by reason of its mutilation; but their Lordships did not determine the point as to the power of the sessions to make the regulation set forth ante, p. 403.

NORTHERN SPRING CIRCUIT, 1840.

YORK ASSIZES.

BEFORE MR. JUSTICE ERSKINE.

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The provisions of the stat. 7 Geo. 4, c. 16, s. 38, extend to the forging and uttering a receipt, or other document, relating to a Chelsea pension, *supposed to be payable;* and are not confined to cases of forging and uttering receipts, and other documents, relating to pensions in actual existence.

An indictment on that statute charged the prisoner with having forged and uttered "a certain receipt, relating to and concerning the payment of a certain pension, to wit, 4*l.* 11*s.* 0½*d.*, *supposed to be payable* to one N. M., as an out-pensioner of the Royal Hospital for Soldiers at Chelsea, in the county of Middlesex."—*Held* good.

FORGERY.—The prisoner was indicted under the 38th section of the stat. 7 Geo. 4, c. 16 (*a*). The first count of

(*a*) By which it is enacted, "that if any person shall willingly and knowingly personate, or falsely assume the name or character, or

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the indictment charged that the prisoner on &c., and &c., "feloniously did *forge* and counterfeit, and cause and procure any other to personate or falsely assume the name or character of any officer, non-commissioned officer, soldier, or other person, entitled or *supposed to be entitled* to any pension, wages, pay, grant, or other allowance of money, prize-money, or relief due or payable, *or supposed to be due or payable*, for or on account of any service done, *or supposed to be done*, by any such officer, non-commissioned officer, soldier, or other person as aforesaid, in his Majesty's army or other military service, or shall personate or falsely assume the name or character of the executor or administrator, wife, relation, or creditor of any such officer, non-commissioned officer, or soldier, or other person as aforesaid, in order fraudulently to receive pension, wages, pay, grant, or any other allowance of money, prize-money, or relief due or payable, *or supposed to be due or payable*, for or on account of any services done, *or supposed to be done*, by any such officer, non-commissioned officer, soldier, or other person as aforesaid, or if any person shall *forge*, or counterfeit, or alter, or cause or procure to be forged, or counterfeited, or altered, or knowingly and willingly act, aid, or assist in forging, counterfeiting, or altering the name or handwriting of any officer, non-commissioned officer, soldier, or other person entitled, *or supposed to be entitled*, to any pension, wages, pay, grant, allowance of money, prize-money, or relief due or payable, *or supposed to be due or payable*, for or on account of any such service or supposed service as aforesaid, or the name or handwriting of any officer, under-officer, clerk, or servant of the said commissioners of the said hospital at Chelsea, or of any officer or person in any way concerned in the paying, or ordering, directing, or causing the payment of the said pensions, wages, pay, money, allowance of money, prize-money, or relief, or any of them, or shall *forge*, counterfeit, or alter, or cause or procure to be forged, counterfeited, or altered, or knowingly and willingly act, aid, or assist in forging, counterfeiting, or altering any letter of attorney, bill, ticket, order, certificate, voucher, *receipt*, will, or any other power, instrument, warrant, *document*, or authority whatsoever *relating to or in anywise concerning the payment or obtaining or claiming any pension*, wages, pay, grant, allowance of money, prize-money, or relief, *for and in order to the receiving, obtaining, or claiming any such pension*, wages, pay, grant, allowance of money, prize-money, or relief, or shall *utter or publish as true*, or knowingly and willingly act, aid, or assist in uttering or publishing as true, knowing the same to be forged, counterfeited, or altered, any such letter of attorney, bill, ticket, order, certificate, voucher, *receipt*, will, or any other power, instrument, warrant, *document*, or authority whatsoever, *with intent to obtain the payment of any such pension*, wages, pay, money, or al-

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procure to be forged and counterfeited, and knowingly and willingly act, aid, and assist in the forging and counterfeiting *a certain receipt* relating to and concerning the payment of a certain pension, to wit, 4*l.* 11*s.* 0½*d.*, *supposed to be payable* to one Nicholas Morrill, as an out-pensioner of the Royal Hospital for Soldiers at Chelsea, in the county of Middlesex, for a certain time, to wit, for ninety-two days, from the first day of July, 1838, to the 30th day of September following, both days included, which said forged and counterfeited receipt is as follows: that is to say, [here the forged receipt was set out, and also the forged certificate attached to it, which stated that the party named in it was alive, and entitled to the pension]; for and in order to the recovery of the said pension, with intent thereby then and there to obtain payment of the said pension from the lords and other commissioners of the Royal Hospital for Soldiers at Chelsea, in the county of Middlesex, against the form of the statute," &c. The 2nd count was exactly similar, except that it stated an intent to obtain payment from "a certain person then and there authorized to pay the same, to wit, one Thomas Constantine Brooksbank," instead of an intent to obtain payment from the commissioners. The 3rd count was like the second, but substituting the name of "Joseph Thompson" for that of Mr. Brooksbank. The 4th and 5th counts were like the 1st and 3rd, but set out the receipt without the certificate. The 6th, 7th, and 8th counts were in the same form as the 1st, 2nd, and 3rd, except they were for *uttering*, instead of *forging*. The 9th count was like

lowance of money, prize-money, or relief from the said commissioners of the said hospital at Chelsea, or from any officer, under-officer, clerk, or servant of the said commissioners, or from the person authorized or supposed to be authorized to pay the same, or with intent to defraud any person whatsoever, or any corporation whatsoever, every such person so offending, being thereof lawfully convicted, shall be, and is hereby declared and adjudged to be, guilty of felony, and shall and may be transported for life, or for such term of years as the Court shall adjudge."

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the 6th, except that it set out the receipt without the certificate. The 10th count was for *forging* "*a certain certificate*, relating to and concerning a certain other pension, to wit, 4*l.* 11*s.* 0½*d.*, *supposed to be payable* to the said Nicholas Morrill as an out-pensioner of the said hospital, for a certain time, to wit, for ninety-two days, from the 1st day of July to the 30th of September following, which said forged and counterfeit certificate is as follows, [the certificate was set out without the receipt], for and in order to the recovery of the said last-mentioned pension," with intent to defraud the commissioners. The 11th count was exactly similar to the 10th, except that it was for *uttering* instead of *forging*. The 12th count was for uttering the certificate, [setting it out], with intent to obtain payment from a certain person then and there authorized to pay the same, to wit, one Joseph Thompson, with intent to defraud the commissioners. The 13th count was for *uttering* a forged "*document*, relating to and concerning the payment of a certain other pension, to wit, 4*l.* 11*s.* 0½*d.*, *supposed to be payable* to the said Nicholas Morrill, as an out-pensioner," [describing it as in the 1st count, and setting out the receipt and certificate], with intent to defraud the commissioners.

It appeared that the prisoner, for the purpose of obtaining payment of a pension which had ceased to exist on the death of a pensioner named Morrill, had forged and uttered a receipt and certificate, which were in the following form :—

"Assignment Receipt,

"84 ft. Nicholas Morrill.

"1*s.* 0½*d* per diem, Sheffield, 426.

"We, the undersigned churchwarden and overseer of the parish of Brightside Brierlow, in the county of York, do hereby acknowledge to have received of Thomas Constantine Brooksbank, Esq., agent for the out-pensioners of Chelsea Hospital, (by the hands of Mr. Joseph Thomp-

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son), the sum of 4*l.* 11*s.* 0½*d.*, being the amount due to the above-named out-pensioner of the said hospital for ninety-two days, from the 1st of July, 1838, to the 30th of September following, both days included, by virtue of an assignment made by the aforesaid pensioner, conformably to an act of Parliament passed in the fifty-ninth year of the reign of his Majesty King George the Third, intituled, 'An Act to Amend the Laws for the Relief of the Poor.' Five per cent. being deducted pursuant to the act of Parliament, 28 Geo. 2, c. 1.

"JOHN WILSON, Churchwarden.

"4*l.* 11*s.* 0½*d.*

"Witness, J. Pringle.

"THOMAS GRAY, Overseer of the Poor."

"We, the undersigned churchwarden and overseer of the parish aforesaid, do hereby certify that the above-named out-pensioner is alive and entitled to his pension, being no otherwise provided for by government.

"Dated this 19th day of October, 1838.

"JOHN WILSON, Churchwarden.

"THOMAS GRAY, Overseer of the Poor."

Verdict—Guilty.

Baines and *Wortley*, for the prisoner, submitted, in arrest of judgment, that, in order to constitute an offence under the latter branch of the 38th sect. of the stat. 7 Geo. 4, c. 16, it was essential that there should be an actual existing pension at the time of the commission of the offence of forging and uttering, and that the indictment should have charged the actual existence of such pension, and that it was not sufficient under that branch of the section to allege (as in the present indictment) that the instrument forged related to a pension *supposed* to be payable.

ERSKINE, J.—The objection, if well founded, is one that

affects not only the form of the indictment, but also the question whether the prisoner has committed a felony or not.—I will reserve the point for the consideration of the Judges.

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Atcherley, Serjt., *Armstrong & Hoggins*, for the Crown.

Baines & Wortley, for the prisoner.

[Attornies—*Bicknell* and *Palfreyman*.]

BEFORE LORD DENMAN, C. J.; TINDAL, C. J.; LORD ABINGER, C. B.; LITLEDALE, J.; PARKE, B.; BOSANQUET, J.; ALDERSON, B.; PATTESON, J.; WILLIAMS, J.; COLERIDGE, J.; COLTMAN, J.; ERSKINE, J.; AND ROLFE, B. *April 25th.*

Wortley, for the prisoner.—The question in his case arises on the wording of the latter part of the 38th section of the stat. 7 Geo. 4, c. 16; and I submit that no offence under that statute is stated on the indictment; and that its provisions as to forging and uttering receipts and documents do not apply to a supposed pension, but only to actually existing pensions. In the earlier part of the section as to personating, and as to the forging of the name or handwriting of any officer, &c., the words "supposed to be entitled," and "supposed to be due and payable" occur, but in the latter part of the section they are omitted, and the forgery and uttering appear therefore to relate to actually existing pensions, wages, pay, &c., and the words "such pension" in that portion of the clause which relates to the uttering of forged receipts and documents, only refer to the last antecedent, which is such pension as is mentioned with respect to the forging of the receipts and documents. This statute is merely a re-enactment of former provisions. In the stat. 46 Geo. 3, c. 69, relat-

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ing to Chelsea pensioners, the provisions as to personating and forging are in separate sections. The 8th section, which relates to personating, contains the words "supposed to be entitled," but in the 9th section, which relates to forgery, they are omitted. In the stat. 47 Geo. 3, sess. 2, c. 25, s. 7 & 8, the same difference occurs; and I submit that where the legislature in one section of an act of Parliament use particular words, and in another section omit them, it must be taken that the omission is intentional. In the cases as to settlement by renting a tenement, the Courts in construing the stat. 6 Geo. 4, c. 57, which omitted some of the terms contained in the stat. 59 Geo. 3, c. 50, held that the construction should be different, and that they were bound by the words of the different enactments. In *Brown's case* (*a*) the prisoner was convicted on the stat. 32 Geo. 2, c. 10, for personating William Wheeler, "a person supposed to be entitled to certain prize-money for service done on board the ship Terpsichore." There was no evidence that William Wheeler ever served on board that ship, or even that such a person existed; and the Judges held the conviction wrong, as there was no evidence that there was any such person as William Wheeler, who either was entitled, or at least primâ facie entitled, to prize-money, as a seaman on board the Terpsichore (*b*), and in *M'Anelly's case* (*c*) it was also held that the personation of a non-existing person was not within that statute. The case of *Rex* v. *Tannett* (*d*) also decides that the personation must be of some person who had belonged to the ship, and that the indictment must charge the personating of some such person; and it would seem

(*a*) 2 East, P. C. 1007.

(*b*) The words of the stat. 31 Geo. 2, c. 10, s. 24, are, "whosoever willingly and knowingly shall personate, or falsely assume the name or character of any officer, seaman, or other person, entitled or supposed to be entitled to any wages," &c.

(*c*) 2 East, P. C. 1009.

(*d*) R. & R. C. C. 351.

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that the objcct of the enactments was to protect the pensioncrs.

Lord DENMAN, C. J.—Would the pensioner lose his pension if the commissioners paid some one else?

Wortley.—In the case of *Rex* v. *Martin* (*a*), the prisoner was indicted under the stat. 54 Geo. 3, c. 93, s. 89, for personating Joshua Boatwright, a seaman entitled to prize-money for service on board a vessel called the Lord Keith. Boatwright had been entitled to the prize-money, but had died before the prisoner had personated him. The prisoner was convicted, and the Judges held that the conviction was right, and that the act applied, although the seaman personated was dead. In the case of *Rex* v. *Cramp* (*b*), who was indicted on the same statute, the prisoner had personated a seaman named Cuff, who was dead, and whose prize-money had been paid to his mother before the time of the personation. The prisoner was convicted, and the Judges held the conviction right; and that the fact that the money had been paid to the mother made no difference; these two latter cases were not decided on the statutes relating to Chelsea pensioners, but on the stat. 54 Geo. 3, c. 93, s. 89, which relates to Greenwich pensioners, and in which the words are "shall forge" &c. "any letter of attorney, bill, ticket, certificate," &c., "in order to receive any such wages, pay," &c., "which shall be due, *or supposed to be due,*" or shall utter any forged letter of attorney, &c., in order to receive any wages, &c., "due, *or supposed to be due,* to any officer or seaman," &c. The words "supposed to be due" occurring in all the enactments respecting forgeries relating to Greenwich pensioners, but not occurring in any of the provisions relating to the forgery of receipts or other

(*a*) R. & R. C. C. 324. (*b*) R. & R. C. C. 327.

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documents relating to Chelsea pensioners, I submit therefore that the indictment is bad.

Hoggins, for the Crown.—I submit that the 35th section of the stat. 7 Geo. 4, c. 16, explains the 38th section, and by the 35th section it is enacted, that "in all indictments, informations, prosecutions, or other proceedings, against any person or persons," "for forging, counterfeiting, or altering, or causing or procuring to be forged, counterfeited, or altered, or aiding or assisting in forging, counterfeiting, or altering, or uttering or publishing as true, or causing or procuring to be uttered or published as true, or aiding or assisting in uttering or publishing as true, knowing the same to be false and counterfeited, any letter of attorney, bill, ticket, order, certificate, assignment, last will or power of attorney, or other power or authority whatsoever, in order to receive, obtain, or claim wages, pay, allowances of money, pension-money, or prize-money due, *or supposed to be due*, to any such officer or soldier, or other person, or for knowingly or willingly taking a false oath, or causing and procuring any other to take a false oath to obtain probate of any will, or to obtain letters of administration, in order to receive, obtain, or claim wages, pay, prize-money, or pension-money, due or supposed to be due to any such officer or soldier, or other person, or for any fraud, misbehaviour, or other offence to which such form is applicable, it shall be sufficient to charge the same as being done with intent to defraud the lords and others commissioners of the Royal Hospital for soldiers at Chelsea, in the county of Middlesex." The form of the present indictment is there recognised, and I submit, that, taking the two sections together, the words " any such pension," at the latter part of the 38th section, must be taken to mean any such pension as is mentioned in the first part of the clause. If the present objection is well founded, no indictment can be framed on

this act for a forgery of a receipt or document relating to a pension supposed to be due.

Lord ABINGER, C. B.—It might be an offence at common law, or an offence against some other statute.

ERSKINE, J.—If the indictment had stated it to be a pension payable to Nicholas Morrill, it would have failed, as there was no proof of an existing pension.

Lord DENMAN, C. J.—In the act the word "of" is omitted.

TINDAL, C. J.—It may be on the roll.

Hoggins.—I put my case in this way:—the first count of the indictment is sufficient, as it follows the words of the 35th section, and I pray that section in aid of the 38th section; and, taking the two sections together, I submit that the indictment is good.

Wortley, in reply.—The 35th section does not give any form of indictment, it is merely intended to apply to the laying of the intent to defraud.

ALDERSON, B.—The words "*any* pension," in the latter part of the 38th section, are very large. The question is, whether they may not include any pension due and payable, any pension supposed to be due and payable, or any pension not yet granted.

BOSANQUET, J.—The receipt itself speaks of its being due and payable to the pensioner.

Wortley.—The indictment might have been for forging a receipt.

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ALDERSON, B.—In *Tannett's case*, the supposed person whom the prisoner personated was not entitled to the money, nor did the persons who were to pay it suppose that he was so, because there was no such man; but where a person had a pension, and was dead, the persons who had to pay the money might still suppose that it was due from them, not knowing of the death.

The case was afterwards considered by the Judges, who held the indictment was good, and the conviction right.

NORTHERN SUMMER CIRCUIT, 1840.

YORK ASSIZES.

BEFORE MR. BARON ROLFE.

REGINA *v.* MEGSON, BATTYE, and ELLIS.

In a case of murder it appeared that two days before the death of the deceased, the surgeon told her that she was in a very precarious state; and that on the day before her death, when she had become much worse, she said to the surgeon, that she found herself growing worse, and that she *had been in hopes* she would have got better, but *as she was getting worse*, she thought it her duty to mention what had taken place. Immediately after this she made a statement:—*Held*, that this statement was not receivable in evidence as a declaration in articulo mortis, as it did not sufficiently appear that, at the time of the making of it, the deceased was without hope of recovery.

MURDER.—The prisoners were indicted for the wilful murder of Ann Stewart.

On the part of the prosecution it was proposed to give in evidence a declaration made by the deceased on the 29th of April, as a declaration in articulo mortis. To shew the state in which the deceased was, a surgeon was called, who said—"On the evening of the 28th of April,

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I found the deceased in bed with all the usual symptoms of fever brought on by cold; on the 29th she complained of her chest, and was suffering from inflammation of the lungs; she was extremely ill, and I then told her she was in a very precarious state; on the next day (the 30th) she was much worse, and, in my judgment, was in imminent danger; she then made a statement to me; upon hearing that statement I examined her person, and found the left labium pudendi much swollen, and the right labium discoloured and the skin within the labia on both sides abraded; she was also suffering much from pain over the ribs, which increased on pressure and on drawing in the breath; she died on the next day. Immediately before she made the statement to me she said that she found herself growing worse, and that she had been in hopes she would have got better, but as she was getting worse, she thought it her duty to mention what had taken place."

ROLFE, B.—I think that it does not sufficiently appear that the deceased was without hope of recovery. I think that I ought not to receive the evidence.

The evidence was rejected (*a*).

The jury found all the prisoners not guilty.

Baines and *Pashley*, for the prosecution.

Wortley, for the prisoner Megson.

Wilkins, for the prisoner Battye.

[Attornies—*Battye & Clay*, for the prosecution; *Floyd*, for the prisoner Megson; *England*, for the prisoner Battye.]

(*a*) See the case of *Reg.* v. *Perkins*, ante p. 395, and the authorities there referred to.

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REGINA *v.* MEGSON, BATTYE, and ELLIS.

July 20th.

On the trial of an indictment for a rape, it appeared that the person alleged to have been ravished, (but who was since dead), had come home evidently suffering from recent violence. It was proved, that on her return home she made a statement as to the injury she had received, and named the persons who had committed it:—*Held*, that the particulars of this statement could not be given in evidence as independent evidence, to shew who were the persons who committed the offence, and that statements of this kind were only admissible to confirm the evidence of the prosecutrix, by shewing that she made a recent complaint of the injury she had received.

RAPE.—The three prisoners who were tried in the last case were indicted for a rape committed on the person of Ann Stewart, (the same person who was alleged in the last case to have been murdered).

Evidence was given to shew that the outrage in question had been perpetrated on Ann Stewart, (who had since died), early on the morning of the 24th of April, and it was proved by the person with whom she lodged, that she returned home about five o'clock on the morning of that day, and that when she so returned her dress was in disorder, and that she had only one boot, and that her cap was torn, and that her clothes were much stained with blood. It was also proved, that on the examination of her person by a surgeon on a subsequent day, it appeared that she had a bruise on the knee, another bruise within the right thigh, a lacerated wound in the vagina, and other marks on the private parts, such as, in the opinion of the medical witnesses, shewed forcible connexion to have taken place. The deceased, as soon as she returned home on the morning of the 24th, made a complaint of what had happened to her on that morning.

Baines, for the prosecution, proposed to ask the terms in which Ann Stewart had made the complaint.

Wortley, for the prisoner Megson.—I submit that that evidence is not admissible. The evidence as to what the deceased said, on returning to her lodgings on the 24th of April, must be confined to the fact that she made a complaint. The *particulars* of the complaint made by her are clearly not admissible as evidence of the truth of her statement. The words of Phillips on Evidence are, "It is now the general practice to exclude any mention of the details of the complaint. In case of the death of the

party injured, or in case of her absence for any cause, he particulars of her complaint stated in the absence of the prisoners could under no circumstances be received (*a*)."

Baines and *Pashley*, for the prosecution.—The woman's complaint of her bodily sufferings is undoubtedly receivable in evidence; that was so held in the case of *Aveson* v. *Lord Kinnaird* (*b*). The only question is, whether her account of the particular cause of those sufferings may be admitted. According to the case of *Thompson and Another* v. *Trevanion* (*c*), the woman's statement of the cause of her sufferings would seem to be admissible. So in *Rex* v. *Foster* (*d*) it was held by Baron *Gurney*, Mr. Justice *Patteson*, and Mr. Justice *Park*, that what a deceased person had said, immediately on being knocked down by a cab, as to the cause of the injury which he had received, was evidence against the cab-driver on his trial for manslaughter. As to the exclusion of the particulars of the complaint in cases of rape, the statement cited from Phillips on Evidence rests on *Rex* v. *Clarke* (*e*). But, in the recent case of *Reg.* v. *Walker* (*f*), Baron *Parke* said, "The sense of the thing certainly is, that the jury should in the first instance know the nature of the complaint made by the prosecutrix, and all that she then said; but for reasons which I never could understand, the usage has obtained that the prosecutrix's counsel should only inquire generally, whether a complaint was made by the prosecutrix of the prisoner's conduct towards her, leaving the counsel of the latter to bring before the jury the particulars of that complaint by cross-examination." The propriety of the ruling in *Rex* v. *Clarke* is also doubted by Mr. Starkie in his work on Evidence (*g*).

(*a*) Vol. 1, p. 204, 8th ed.
(*b*) 6 East, 188.
(*c*) Skinn. 402, cited 1 Phill. on Ev. 203.
(*d*) Ante, Vol. 6, p. 325.
(*e*) 2 Stark. N. P. C. 242.
(*f*) 2 M. & Rob. 212.
(*g*) 2 Stark. Ev. 700, n. (a).

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ROLFE, B.—There is a wide difference between receiving such statements as confirmatory of a prosecutrix's credibility in a charge of rape, on which she is examined as a witness, and in a case like the present, where the complaint made is to be received as independent evidence. I entertain very great doubts indeed, about the admissibility of such evidence.

The evidence was not given.

ROLFE, B., (in summing up).—I had a strong feeling, that it was not competent to the prosecutor to extract in detail the complaint made by the deceased on her return home. In ordinary cases of rape, where a witness describes the outrage in the witness-box, evidence of her complaint soon after the occurrence of the outrage is properly admissible to shew her credit and the accuracy of her recollection. Here, however, the object was to give in evidence the particulars of the complaint as independent evidence, with a view of shewing who were the persons who committed the offence (*a*). All that could safely be received was, I think, her complaint that a dreadful outrage had been perpetrated upon her.

The prisoners were acquitted.

Baines and *Pashley*, for the prosecution.

Wortley, for the prisoner Megson.

Wilkins, for the prisoner Battye.

[Attornies—*Battye & Clay* for the prosecution; *Floyd* for the prisoner Megson; *England* for the prisoner Battye.]

(*a*) See the case of *Rex* v. *Gutteridge*, post.

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NEWCASTLE ASSIZES.

BEFORE R. B. ARMSTRONG, ESQ.

(*Who sat for Mr. Justice Coltman*).

REGINA *v.* ROBSON.

A count in an indictment for forging a request for the delivery of goods, which describes the forged instrument as "a certain forged request for the delivery of goods to one J. R.," is good under the stat. 2 & 3 Will. 4, c. 122, s. 2, and is not too general.

FORGERY.—The first count of the indictment charged, that the prisoner, on and at &c., "feloniously did forge a certain request for the delivery of goods," which said forged request for the delivery of goods is as follows, that is to say:—

"May 17, 1840.

"Mr. French, Newcastle-on-Tyne.

"Sir—Please to forward as address below, soon as possible, three mourning rings, sizes O. P. Q., good weight and well finished; three or four gold *guard curbs;* the last you sent me were not as I like them; you may send one or two ladies' gold watches, fashionable patterns; I want them immediately. As I may be from town for a short time, you had better direct your parcel to Mr. J. Robinson, 88, Percy-street, Newcastle, as Mr. R. is the person I wish to recommend to you; he is a safe hand, having plenty of cash; he is the writer of this: and as my clerk deceived me to a considerable amount, be particular not to address it Robson. I hope you will be kind enough to let Mr. Robinson have them directly. I remain yours, &c.

"G. B. BERGNA.

"P. S. I have thought it best to sign my own name, as a precaution against future trouble.

"For Mr. B. Bergna,

"Mr. J. French, Jeweller, JACOB ROBINSON.
"5, Newcastle-place, London"

—with intent to defraud one Jacob French, against the form of the statute" &c. The second count was for uttering the

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forged request for the delivery of goods, setting it out exactly as it was set out in the first count. The third and fourth counts were similar to the first and second counts, except that, in setting out the forged instrument, the address "Mr. J. French, jeweller, 5, Newcastle-place, London," was omitted. The fifth count charged that the prisoner on &c., at &c., "feloniously did forge *a certain other request for the delivery of goods*, with intent to defraud the said Jacob French; against the form of the statute," &c The sixth count charged that the prisoner on &c., at &c. "feloniously did offer, utter, dispose of, and put off *a certain other request for the delivery of goods*, with intent to defraud the said Jacob French, he the said Joseph Philip Robson, at the time he so uttered, put off, and published the said last-mentioned forged request for the delivery of goods as aforesaid, then and there well knowing the same to be forged; against the form of the statute," &c. The seventh count charged that the prisoner on &c., at &c., "feloniously did offer, utter, dispose of, and put off *a certain other forged request for the delivery of goods to one Jacob Robinson*, with intent to defraud the said Jacob French, he the said Joseph Philip Robson, at the time he so uttered, put off, and published the said last-mentioned request for the delivery of goods, to the said Jacob Robinson, then and there well knowing the same to be forged; against the form of the statute, &c. The eighth count was exactly similar to the seventh, except that it stated the instrument to be a forged request for the delivery of goods to Giovanni Battista Bergna, instead of describing it as a forged request for the delivery of goods to Jacob Robinson.

It appeared that the prisoner had formerly been employed by Mr. Bergna, (who was but little acquainted with the English language), to write letters for him, and that the forged document was received by Mr. French, who resided in London, and had before sold goods to Mr. Bergna.

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Evidence was given to shew that the forged instrument was in the handwriting of the prisoner, and also that the paper on which it was written had been torn from a copy-book, which was found in the room in which the prisoner was apprehended.

The forged instrument was put in and read; and it appeared that the words which in the setting of it out in the indictment were set out as "guard curbs," in the instrument itself were "guards curbs." It was proved that by the term guards is meant chains to guard a watch or eye-glass, and that the term curb means a description of the pattern.

Wortley, for the prisoner, submitted—first, that with respect to those counts of the indictment in which the instrument was set out, the laying of the words to be "guard curbs" instead of guards curbs was a fatal variance, and he cited the case of *Rex* v. *Drake* (*a*); and secondly, that the other counts were bad, as they did not describe the instrument in such a manner as would sustain an indictment for stealing it, so as to satisfy the provisions of the stat. 2 & 3 Will. 4, c. 123, s. 2, which provides, that in indictments for forgery it should be sufficient to describe the forged instrument "in such a manner as should sustain an indictment for stealing the same."

Ingham and *Granger*, for the prosecution, submitted—first, that there was no variance, as the sense of the words was not altered by the introduction of the letter *s*, and that the words "three or four gold guard curbs" meant exactly the same as the words "three or four gold guards curbs."

(*a*) 2 Salk. 660. In that case, which was an information for a libel, it was held that the setting out of the word "nor" instead of the word "not," was a fatal variance, although the sense was not altered thereby.

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They cited the cases of *Rex* v. *Hart* (*a*), *Rex* v. *Beach* (*b*), and *Rex* v. *Oldfield* (*c*), and on the second point they submitted that the description of the forged instrument was quite sufficient to satisfy the provisions of the stat. 2 & 3 Will. 4, c. 123, s. 2; for that, in indictments for larceny of written documents, the instrument was always described in terms quite as general as those contained in the present indictment.

Mr. ARMSTRONG, considering it doubtful whether the objections could be sustained, left the case to the jury, who found the prisoner

Guilty.

Ingham and *Granger*, for the prosecution.

Wortley, for the prisoner.

[Attornies—*Coxwell* and *Hoyle*.]

In the ensuing term the case was considered by the fifteen Judges, who held the conviction right, and that the counts which did not set out the instrument were good, under the stat. 2 & 3 Will. 4, c. 123, s. 2 (*d*); but the point as to the variance was not decided.

(*a*) 1 Leach, 172. In that case it was held, that the word "*receiv-ed*," in the setting out of a forged instrument, and the word "*reicev-ed*" in the instrument itself, was no variance.

(*b*) 1 Cowp. 229. In that case a variance of "*undertood*" instead of "*understood*" was held not to be material; and in that case Lord *Mansfield*, C. J., said—"The true distinction seems to have been taken in the case of *Reg.* v. *Drake*, which is this: that where the omission or addition of a letter does not change the word so as to make it another word, the variance is not material."

(*c*) 2 Russ. C. M. 1482. In that case a forged bill, addressed to *Messrs.* Masterman, was set out as being addressed to *Messs.* Masterman, and this was held to be no variance, and Sir *W. Russell* adds, (ib.) "But if by addition, omission, or alteration the word is so changed as to become another word, the variance will be fatal."

(*d*) See the next case and the note to that case.

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WELSH SUMMER CIRCUIT, 1840.

BEAUMARIS ASSIZES.

BEFORE LORD DENMAN, C. J.

REGINA *v.* DAVIES.

FORGERY.—The prisoner was indicted for forging and uttering a deed. The first count of the indictment charged the prisoner with having forged the deed; and the second count, which was for the uttering, was in the following form:—"And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Philip George Davies, on &c. at &c., feloniously did offer, utter, dispose of, and put off, a certain other deed, purporting to be made on the first day of March, in the year of our Lord one thousand eight hundred and thirty-seven, between one Robert Williams of the one part and the said David Griffith of the other part, and purporting to be an underlease by the said Robert Williams to the said David Griffith of certain lands, tenements, and premises therein mentioned, subject to the payment of the yearly rent of eight pounds, payable on the first day of March in every year, and purporting to contain a covenant by the said David Griffith with the said Robert Williams for the payment by the said David Griffith to the said Robert Williams of the yearly rent of eight pounds, with intent to defraud the said George Bradley Roose; the said Philip George Davies at the time he so uttered and published the last-mentioned

A count in an indictment for uttering a forged deed described it as "a certain deed, purporting to be made on the 1st day of March, 1837, between R. W. of the one part, and D. G. of the other part, purporting to be an underlease by the said R. W. to the said D. G. of certain lands, tenements, and premises therein mentioned, subject to the payment of the yearly rent of £8, payable on the 1st day of March in every year, and purporting to contain a covenant by the said D. G. with the said R. W. for the payment, by the said D. G. to the said R. W., of the yearly rent of £8:"—*Held*, good, under the stat. 2 & 3 Will. 4, c. 123, s. 2.

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deed as aforesaid, then and there well knowing the same to be forged, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity."

There was no sufficient evidence on the first count, but the second was fully proved.

Jervis, for the prisoner, submitted, that the second count of the indictment did not sufficiently describe the forged instrument under the stat. 2 & 3 Will. 4, c. 123, s. 2.

Lord DENMAN, C. J., reserved the point for the consideration of the fifteen Judges.

Verdict—Guilty.

Townsend, for the prosecution.

Jervis, for the prisoner.

[Attornies—*Roose*, and *Lloyd Roberts*.]

In the ensuing term the case was to have been argued before the fifteen Judges, and *Townsend*, for the prosecution, appeared before their Lordships to argue the case in support of the conviction, but he stated that no counsel appeared for the prisoner.

Lord DENMAN, C. J.—I think that if no counsel is instructed on the part of the prisoner, we ought not to hear counsel on the part of the prosecution.

The case was not argued, but having been considered by the Judges, their Lordships held that the second count of

the indictment was good, and that the conviction was right (*a*).

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(*a*) See the preceding case, and see the case of *Reg.* v. *Rogers*, ante, p. 41, as to the form of a count for forging a warrant for the payment of money, framed on the stat. 2 & 3 Will. 4, c. 123, s. 2, and the case of *Reg.* v. *Martin*, ante, Vol. 7, p. 549, as to the form of a count for forging a receipt framed on the same statute. In the case of *Reg.* v. *Raake*, ante, Vol. 8, p. 626, the indictment charged the prisoner with having forged "a certain order for the payment of money, to wit, for the payment of 60*l.*," without setting it out or further describing it.

HOME SUMMER CIRCUIT, 1840.

BEFORE MR. BARON GURNEY.

REGINA *v.* WHITEHEAD.

HOUSEBREAKING.—The first count of the indictment charged the prisoner with feloniously breaking and entering the dwelling-house of Elizabeth Andrews, and stealing therein several articles of wearing apparel, her property. In a second count the articles were charged to be the property of the Queen.

It appeared that the husband of Elizabeth Andrews had been convicted of felony; that at the time the house was broken into and these things stolen he was in Maidstone gaol, under sentence of imprisonment for one year, and

A prisoner was indicted for breaking into the house of Elizabeth A. and stealing her goods. There was a second count, laying the property of the goods in the Queen. It was shewn by proof of the record that the husband of Elizabeth A. had been convicted of felony, and it was also proved that he was still in prison under his sentence, and that the articles stolen were his before his conviction, and had remained in the house from the time of his apprehension, and that the wife continued in the possession of the house and goods till they were stolen by the prisoner:—*Held*, that the prisoner might be properly convicted of larceny on the second count, which laid the property of the goods in the Queen, although there had been no office found, and that he could not be convicted of housebreaking, as that part of the indictment which laid the goods and the house to be those of Elizabeth A. could not be supported.

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the record of his conviction and sentence was proved. It was also proved that all the articles included in the indictment had been the property of the husband, and had remained in the house from the time of his apprehension, and that the wife continued in possession of the house and the goods till they were stolen.

Horn, for the prisoner, submitted that the prisoner could not be convicted either of the housebreaking or the larceny, as the house was not in point of law the house of Elizabeth Andrews, nor were the goods her property, neither were the goods the property of the Queen, notwithstanding the conviction of the husband, until office found.

GURNEY, B., reserved the case for the consideration of the fifteen Judges.

Verdict—Guilty.

Horn, for the prisoner.

[Attorney—*De Lasaux.*]

IN the ensuing Term the case was considered by the Judges, who held the conviction good for the larceny only on the second count, which laid the property of the goods to be in the Queen.

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MIDLAND SUMMER CIRCUIT, 1839.

WARWICK ASSIZES.

(Crown Side.)

BEFORE MR. JUSTICE LITTLEDALE.

REGINA *v.* NEALE and Others.

August 2nd.

RIOT.—The defendants were indicted for a riot at Birmingham on the 4th of July, 1839.

It was opened by *Campbell*, A. G., for the Crown.—That before the 4th of July, 1839, there had been several meetings of a tumultuous character in the town of Birmingham, and that, on account of the then inefficient state of the police of that town, the mayor of Birmingham proceeded to London on the 3rd of July, accompanied by Dr. Booth and Mr. Chance, who were magistrates; and on the 4th of July they came back with sixty of the metropolitan police force, whom Mr. Chance swore in as special constables under the stat. 5 & 6 Will. 4, c. 43. On the evening of the 4th of July there was a tumultuous meeting in the Bull-ring at Birmingham; a great number of persons assembled; they had flags; there were harangues; and the people of the town were most seriously alarmed. That such an assembly was an unlawful assembly could not for a moment be doubted, because every assembly to the ter-

Any assembly of persons attended with circumstances calculated to excite alarm is an unlawful assembly, and it is not only lawful for magistrates to disperse an unlawful assembly, even when no riot has occurred; but if they do not do so, and are guilty of criminal negligence in not putting down any unlawful assembly, they are liable to be prosecuted for a breach of their duty.

The mode of dispersing an unlawful assembly may be very different according to the circumstances attending it in each particular case; and an unlawful assembly may be so far verging towards a riot, that it may be the bounden duty of the magistrates to take immediate steps to disperse the assembly; and there may be cases where the magistrates will be bound to use force to disperse an unlawful assembly.

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ror of her Majesty's subjects was an unlawful assembly, and though there be no breach of the peace, if the assembly is of such a nature as to cause alarm, no one can tell where it will end, or what will be its consequences, and the law will not allow such an assembly (*a*). After the arrival of the metropolitan policemen in Birmingham, and after they had been sworn in by Mr. Chance as special constables, Dr. Booth proceeded with them to the Bull-ring, and desired the mob to disperse; but the mob refusing to disperse, the magistrates did what their duty required—they called on the policemen, who had been made special constables, to do what was necessary to apprehend the offenders and disperse the unlawful assembly. At first the policemen prevailed to a certain extent, but the mob were so numerous, and acted so outrageously, that the police were overpowered, and several of them dangerously wounded. The riot continued for a considerable time. The Riot Act was read, and it was found necessary to call in the military, by whom the streets were cleared, and the peace of the town prescrved. It would be shewn clearly that there was a most dangerous riot subsisting for more than an hour, and that the defendants were concerned in it.

It was proved by Dr. Booth and other witnesses, that before the 4th of July there had been meetings in Birmingham, and that the tradesmen were in such terror that they closed their shops, and some of them complained to the magistrates, wishing them to take steps to prevent the continuance of the meetings; and that the police force of Birmingham at that time amounted to about twenty-eight persons, some of them decrepit old men; the population being about 200,000. That the mayor, Mr. Chance, and Dr. Booth obtained the attendance of sixty of the metropolitan police force, whom Mr. Chance swore in as special

(*a*) See the case of *Regina* v. *Vincent*, ante, p. 91, and the case of *Rex* v. *Birt*, ante, Vol. 5, p. 154.

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constables. It was also proved by Dr. Booth, that at about eight o'clock in the evening of the 4th of July, he proceeded to the Bull-ring, at Birmingham, which was crowded; and that the people groaned at him, and called him a spy; and that the mayor and himself proceeded with the policemen to the Bull-ring; that both the mayor and himself desired the mob to disperse, which they would not, and stones were thrown by the mob, and the horse of Dr. Booth was struck; and that Dr. Booth directed the policemen to take a man who was reading a paper to the crowd, when the mob began hissing and groaning, and confusion and riot and throwing stones followed. It was also proved that the policemen tried to disperse the mob, and that they were overpowered; and that the policemen used their staves, and the mob used bludgeons and stones, and also a dagger or some sharp instrument, as two of the police were cut and wounded. It was further proved that the Riot Act was read, and the military sent for; and that in about an hour the mob were dispersed. Evidence was given to shew that each of the defendants took an active part in the riot. It also appeared, from the cross-examination of the different witnesses, that there had been frequent meetings of great numbers of persons in Birmingham, and considerable excitement in the year 1832, on the subject of the Reform Bill.

Miller, for the defendant Storey.—It is not because on certain occasions large numbers of persons may be assembled to effect a political purpose, or to exercise a political right, and timid persons may apprehend a disturbance, that therefore such meetings are illegal. If it were so, there could hardly be a contested election in any part of the kingdom; for it rarely happens that there is a contested election without great excitement existing, and much apprehension in the minds of the timid and more nervous portions of society. A meeting may pursue its legitimate purpose, and though there may be some sudden terror ex-

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cited, yet the meeting is not thereby rendered an illegal meeting. Suppose that there is a large meeting to petition parliament to redress some supposed grievance, many persons may think that it may lead to a breach of the peace; but does that render the meeting illegal? If it does, what would become of the right of the people to assemble to petition, if they cannot meet in such numbers as to give weight to their petitions, or lest nervous people might suppose that from the vigour of the language used danger might result to the neighbourhood; and it is not because certain persons may have applied to the magistrates to have special constables sworn in, and may have apprehended disturbance, that it necessarily follows that such meetings would be illegal. And now let us see whether there was any necessity for the introduction of any power, originally foreign, into the town of Birmingham on this occasion. Not a single inhabitant has been called to state that this meeting was conducting itself in a manner calculated to produce the slightest alarm; and what right has any magistrate to tell people in a public area in a town to disperse? and unless he has a right to do so, if he let loose a body of constables upon them, and the people resist in consequence of being assailed, they are justified by law, and the rioters are the men who are set upon them, and not those who are assailed. If the police or the magistrates had no authority to assail the people, and a riot ensued afterwards, the people were justified in repelling the assault, and were not guilty of any offence.

Campbell, A. G., in reply.—I will venture to lay down this as law: If this meeting had been perfectly lawful; if they had met on the requisition of the mayor of Birmingham to consider of a petition legally addressed to her Majesty, the subsequent conduct of the mob was highly criminal; because, even if an assembly which has lawfully met together, shall be required by a magistrate to disperse, that

would give them no right to throw stones, no right to make use of bludgeons or stabbing instruments. If they would be justified in continuing to meet and keep together in the place, that can never justify them in becoming assailants. However, it appears here, that the moment they were desired to disperse, stones flew about, the horse of Dr. Booth was struck; and it is shewn abundantly by the evidence, that this assembly was in every point of view utterly illegal.

LITTLEDALE, J. (in summing up).—It appears, that, on several days before the 4th of July, a great number of persons were assembled at Birmingham; and it also appears that on the 4th of July there was an assembly of persons; but up to the time that Dr. Booth went in among them, I do not find that any riot had taken place on that day; it is, however, another question whether there had been an unlawful assembly; because if there was a meeting attended with circumstances calculated to excite alarm, that is an unlawful assembly; and whether there be an unlawful assembly, may also depend on the resistance made to the attempts to disperse it, and prevent the persons remaining together; and it is not only in the power of magistrates, and not only lawful for magistrates to disperse any such meeting, but if they do not, and are guilty of criminal negligence in not putting down any unlawful assembly, they are liable to be prosecuted for a breach of their duty (*a*). The first question in the present case is, whether this meeting, constituted as it was before Dr. Booth and the police made their appearance, was an unlawful assembly; if it was, then the magistrates had a right to disperse it. The mode of dispersing an unlawful assembly may be very different, according to the circumstances attending it. It might be an unlawful assembly in a very slight degree; parties might have got just within the pale

(*a*) See the case of *Rex* v. *Pinney*, ante, Vol. 5, p. 254, and the notes to that case; and the case of *Rex* v. *Kennett*, Id. p. 282.

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of what is unlawful, and the appearance of one magistrate and two or three constables might disperse them. If this assembly were of that description, there was no pretence for a magistrate's going with a great police force to disperse the persons assembled. But all these cases admit of a variety of shades, because an assembly may be such that though, up to the time the magistrate goes to it, there may be no breach of the peace, yet it may be so far verging towards a riot, that it may be the bounden duty of the magistrates to take immediate steps to disperse the assembly. If it was a slight matter, a magistrate going with two or three constables would oblige the people to go away at once; but if he were to go to a large and tumultuous meeting with only two or three constables, it would be absurd, and he would only be laughed at; and there may be cases where a magistrate would be bound to use force to disperse the assembly. All these different cases must depend on their own circumstances; and you would have to say in each, whether, under the particular circumstances, the magistrates were justified in resorting to the means that they did. If the meeting about which we are now inquiring was an unlawful assembly, it was the duty of the magistrate to disperse it; and you will then have to consider whether the magistrates used more violent means than were necessary to disperse the assembly. They are to use all lawful means, and you must say whether or not they did more.

The jury found all the defendants guilty.

Campbell, A. G., *Balguy*, and *Waddington*, for the Crown.

Miller, for the defendant Storey.

[Attornies—*Solicitors of the Treasury & Griffiths* for the prosecution, and *J. Smith* for the defendant Storey.]

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REGINA *v.* HOWELL, ROBERTS, JONES, and WILKES.

August 1*st*.

All those who assemble themselves together with an intent even to commit a trespass, the execution whereof causes a felony to be committed, and continue together abetting one another till they have actually put their design into execution, and also all those who are present when a felony is committed, and abet the doing of it, are principals in the felony.

INDICTMENT, on the stat. 7 & 8 Geo. 4, c. 30, for feloniously demolishing a house. The first count of the indictment charged that the prisoners, together with divers others, to the jurors unknown, to the number of 2000, on the 15th of July, 1839, riotously and tumultuously assembled together to the disturbance of the public peace, and with the said other persons so riotously and tumultuously assembled together, did feloniously and unlawfully, and with force, demolish, pull down, and destroy a certain house, *in*

Where persons combine to stand by one another in a breach of the peace, with a general resolution to resist all opposers, and in the execution of their design a murder is committed, all of the company are equally principals in the murder, though at the time of the fact some of them were at such a distance as to be out of view.

A. and others were indicted for feloniously demolishing the house of B. It was proved that A. and a mob of persons assembled at H.; A. there addressed the mob in violent language, and led them in a direction towards a police office about a mile from H., some of the mob from time to time leaving and others joining. At the police office the mob broke the windows, and then went and attacked the house of B., and set it on fire—A. not being present at the attack on the house or at the fire:—*Held*, that on this state of facts A. ought not to be convicted of the demolition, as it did not sufficiently appear what the original design of the mob at H. was, nor whether any of the mob, who were at H., were the persons who demolished B.'s house.

If rioters attack a house and have begun to demolish it, but leave off of their own accord after having gone a certain length, and before the act of demolition is completed, this is evidence from which a jury might infer that they did not intend to demolish the house; but if the mob were prevented from going on by the interference of the police or any other force, that would be evidence to shew that they were compelled to desist from that which they had designed, and it would be for the jury to infer that they had begun to demolish within the stat. 7 & 8 Geo. 4, c. 80, s. 8.

Destroying moveable shop-shutters is not a beginning to demolish within that statute, as they are not part of the freehold.

If rioters destroy a house by fire, that is as much a demolition within the stat. 7 & 8 Geo. 4, c. 30, s. 8, as if any other mode of destruction were used.

If a part of the object of rioters be to demolish a house, it makes no difference that they also acted with another object, such as to injure a person who had taken refuge there.

A house is properly described as "in the parish of Birmingham," although for certain ecclesiastical purposes that parish is divided into three divisions, each called a parish.

A. had been committed for more than twenty days on a charge of riot. At the assizes he was indicted for feloniously demolishing a house: A's counsel applied to postpone the trial, and to have a statement of the evidence of several witnesses, whose names were on the back of the indictment, but who were not examined before the magistrates. The Judge postponed the trial till the next day, and held that the prisoner was only entitled to a copy of the depositions taken before the magistrates.

B. had been committed for less than twenty days on a charge of riot, and was indicted for felonious demolition. His counsel stated that he had intended to traverse, and was wholly unprepared to try. The Judge postponed the trial for two days, and would not postpone the trial till the next assizes, as the general nature of the charge was not so different that the prisoner must be taken to be wholly ignorant of it.

If a person be indicted for a misdemeanor, and it be a different misdemeanor from that for which he has been committed or held to bail, he is entitled to traverse, although he has been committed or bailed more than twenty days.

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the parish of Birmingham, belonging to James Bourne and Henry Bourne. The second count charged, that the prisoners did "begin to demolish and pull down" the house. The indictment also contained other counts, on which no question arose.

As soon as the prisoners had pleaded, *Daniel*, for the prisoner Wilkes, stated that the prisoner Wilkes had not been committed on any charge of felony, but had, on the 18th of July, been committed on a charge of misdemeanor, alleged to have been committed by the prisoner Wilkes on the 15th of July; and that depositions had been returned which referred to that charge (*a*). He therefore applied that the trial should be postponed, and that the Crown should furnish to the prisoner a statement of the evidence to be adduced against him on the charge of felony.

LITTLEDALE, J.—I do not say anything at present as to postponing the trial; but as to the other point, whoever heard that any prisoner was to be furnished with a statement of the evidence? If there are any depositions, they are returned, and the prisoner is entitled to a copy of them. This is only like any other felony. In cases of high treason there are particular arrangements as to the list of witnesses, and a copy of the indictment &c.; but that does not apply in felony. If the prisoner had been indicted for a misdemeanor, and that had been a different misdemeanor from that for which he had been committed, or held to bail, he would have been entitled to traverse, even though he had been committed or bailed more than twenty days. But this case is the same as that of any felony (a highway robbery, for instance) which has occurred during the assizes, and there the prosecutor is always entitled to prefer his indictment and try at the same assizes.

(*a*) The prisoners Wilkes and Jones had been committed on a charge of riot, alleged to have occurred at Birmingham on the 15th of July, 1839.

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An affidavit of the prisoner Wilkes was put in, which stated that he was committed for a misdemeanor; that six persons were examined as witnesses against him, and that he was now indicted for a felony of which he was ignorant, and that he was unable to defend himself, there being seventeen witnesses on the back of the bill, of whose evidence he knew nothing.

Campbell, A. G., for the Crown.—If the affidavit had stated that there was any particular witness whose attendance the prisoner could not procure at these assizes, there might be some ground for postponing the trial, but nothing of the kind is suggested here.

Daniel.—If the affidavit had named any witness, it would not have been entitled to credit, as the statement is, that the prisoner is ignorant of the evidence he has to meet.

LITTLEDALE, J.—It does not appear to me that the general nature of the charge is so different from that on which the prisoner was committed, that the prisoner must be taken to be wholly ignorant of it, and that I ought to postpone the trial till the next assizes; but it seems to me to be reasonable, as the case has taken a different turn, that a reasonable time should be given, because the course of defence may be different in felony to that in misdemeanor. I therefore think that the trial should stand over till to-morrow.

Miller, for the prisoner Jones, applied that the trial should be postponed as to him, on the ground that the prisoner Jones had been charged before the magistrates with a misdemeanor only, and had not been committed twenty days, and that, intending to traverse to the next assizes, he was wholly unprepared to take his trial.

LITTLEDALE, J.—Your affidavit will state that your client is entitled to traverse, that he did not expect to take his

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trial at all these assizes, and he is therefore to be considered in the situation of a person who is totally unprepared, and has got no witnesses, and intended to traverse. I think it is reasonable that you should have till the day after to-morrow.

August 3rd.

It was opened by *Campbell,* A. G., that a mob of disorderly persons had met between seven and eight o'clock on the evening of Monday, the 15th of July, 1839, at Holloway-head, which is a place adjoining the town of Birmingham, and that a number of persons were also assembled at the Bull-ring, in Birmingham, which surrounds St. Martin's Church, in that town; and that this mob, who were armed with bludgeons, sticks, and iron rails, came up a place called Digbeth, at about eight o'clock, and proceeded to the public office, where they demolished the windows, and then proceeded by the Bull-ring and attacked the house of Messrs. Bourne, wholesale and retail grocers, in Moor-street, where they broke the shop shutters, destroyed the windows, got into the warehouse, brought out the goods and burnt them, and then set fire to the house; these proceedings lasting till about a quarter before ten o'clock, when the police and the military were called in, and the engines sent for; and at about one o'clock the flames were extinguished, nothing remaining of Messrs. Bourne's house except the brick walls. He submitted that it was not necessary to shew that the prisoners, or any of them, took hammer in hand, and by actual muscular exertion assisted in destroying the house of Messrs. Bourne, neither was it necessary to shew that any of them took fire or fed the flames that were consuming the premises of Messrs. Bourne, for that if the prisoners were abetting the act they were guilty as principals; and with respect to most of the prisoners the question would be, whether they were not guilty of abetting those who with their own hands committed the offence; and if they were so, they were guilty of acting as principals; and the charge was made

out. He cited Curwood's Hawkins, Vol. 2, c. 29, s. 8, and the case of *Rex* v. *Batt* (*a*).

On the part of the prosecution, Mr. Henry Bourne was called: he said, "I live in High-street, in Birmingham; I occupy a house and warehouses there; they are in the parish of St. Martin; I am a tea-dealer and grocer; my partner is James Bourne; the premises are occupied by myself and him, and our trade is carried on there; previous to the 15th of July, Birmingham was much excited; and on the 15th of July, I observed, in the evening, about eight o'clock, persons collecting together in great numbers; they were more particularly in Digbeth, a street leading out of the Bull-ring; our retail premises are in High-street, and our wholesale premises in Moor-street; both streets communicate with the Bull-ring; at about eight o'clock I desired the house to be shut up; the shop was secured with iron bolts and bars; the house was fastened in the same way; after I had fastened the house and shop I went up stairs and looked out of a window; I saw from the window a great number of persons—hundreds of persons; they were walking towards the public office; that is about thirty or forty yards from my house; on seeing them pass towards the public office, I remained where I was; immediately afterwards I heard the windows of the public office breaking; the mob then came back and commenced breaking our windows, and then our shutters; it was the windows in Moor-street they first broke, and then the shutters of the shop; the house and shop are all one entire set of premises; they then broke the windows and the frames of the shop, after the shutters had been taken down; they then entered the shop and demolished every thing; they threw the counters about, and wasted and destroyed every thing; I found the stones so flying about, that our lives were in danger; a great number of persons had got into the shop; I suppose there

(*a*) Ante, Vol. 6, p. 329. See also the charge of Lord Chief Justice *Tindal*, on the Bristol Special Commission, ante, Vol. 5, p. 261, n.

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were thirty or forty who got in; there was a great confusion and row—that is, hurraing; there was the same noise when they got into the house; in this state of things I went to the public office; between my quitting and returning to the premises an hour had elapsed; on returning I found my premises on fire; it was the shop part of the premises I found on fire; it appeared to have been burning for some time; the fire seemed to have burned the shop completely."

Mr. Edward Adams:—"I was in the Bull-ring on the 15th of July, at eight o'clock; I saw very large numbers of persons there; I saw large numbers coming into the Bull-ring from Holloway-head, Digbeth, and New-street; stones were thrown indiscriminately into the air among the people; I went up stairs to the drawing-room window in the house of Mr. Taylor; that is part of the market-house; there was at this time a mob of from two to three thousand in the Bull-ring; they moved towards the public office, up Moor-street; I could not then see them, but I could hear them; they were making a great noise; in a short time they came back into the Bull-ring, and I could then see them; I saw them commence deliberately to destroy Mr. Bourne's shutters; before that they broke his windows with a shower of stones; they used, in destroying Mr. Bourne's shutters, boughs of trees, bludgeons, rails, and pieces of iron; the pieces of iron appeared to be railings from palisades; at the next adjoining shops they broke at the same time the shutters and windows; they broke open the lower part of the shop-window of Mr. Bourne's house; they broke the shutters into splinters; I could not say who were inside, but some appeared to be on the 'bulk' of the window, handing goods to those who were outside; they appeared to be fruit-boxes; there were Chinese paintings on them; they were not boxes of tea; they carried them to near Nelson's monument, and then broke them to pieces; they passed them across the Bull-ring from hand to hand; they also got tickens from Mr. Legget's; they got in there by breaking the shutters and

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windows; Mr. Legget is a feather merchant, and I believe an upholsterer; they brought from his shop rolls of ticken; they unrolled them in the Bull-ring, where the boxes were; they carried them down to where they had deposited the other plunder; they put all together, made a heap, and set it on fire; I do not know how they lighted the fire, but I saw them feeding the fire and it blazing up; I saw the fire fed from time to time with wood from the shutters; the ticken was burning; I saw them carry the fire from the Bull-ring and put it inside the shops of Bourne and Legget; they then set fire to the shops of Bourne and Legget; I was about fifty-five minutes looking on at this transaction; they began at Bourne's at about seven minutes to nine o'clock; shortly before ten I went to the public office, I made my escape from Mr. Taylor's back windows; they attacked the house next to it, and the family were alarmed; when I arrived at the public office I saw the dragoons; they were galloping down towards Moor-street, as if they were coming from the barrack; they began to disperse the mob instantly."

Evidence was given to shew that the prisoner Howell was present at the fire at Messrs. Bourne's, and inciting the mob; and that the prisoner Roberts was also there, throwing stones; and that the prisoner Jones was there, carrying a handkerchief on a stick as a flag, and waving it about, and calling on the mob to come on.

With respect to the prisoner Wilkes, Mr. Alfred Webb was called. He said:—" I am a stationer; I was at Holloway-head on the 15th of July last; I saw Wilkes, the prisoner; it was a little after seven in the evening when I saw Wilkes at Holloway-head; there were 2000 or 3000 persons there; I was thirty or forty yards from Wilkes; I could hear him as distinctly as I hear counsel examining me; he began by saying, that 'too much time had been lost in speaking.' Then he said, (addressing the assembly), 'The time was now come to act, they must act now decisively;' he said he did not wish to run the people into unnecessary danger, but they must prepare themselves; he

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alluded to the previous riot on the Thursday week; I am only giving the substance of what he said; he added, 'It was well for the police that we were not well armed;' he added, I believe, that they were not yet strong enough to meet the soldiers, but if the streets were barricaded, and the railroad destroyed, they need not fear;' he added, that 'there were 200,000 men, completely armed, ready to march and join them at Birmingham at a moment's notice;' the people said, 'We are ready now—we will go now;' Wilkes was speaking when I left; it was then about a quarter to eight o'clock; Holloway-head is not quite a mile from the Bull-ring."

In his cross-examination, Mr. Webb said:—"I have heard violent harangues in the Bull-ring, but not elsewhere in Birmingham; I was at one of Hunt's meetings in London; I believe there has been a very great excitement in Birmingham amongst the labouring classes against the London police."

Mr. Charles Bates said:—"On the 15th of July I went in the direction of Holloway-head that evening as far as Smallbrook-street; it is the direct line from Holloway-head; I got there between seven and eight o'clock; I saw a large crowd coming from Exeter-road, which leads from Holloway-head; many of them had staves or bludgeons in their hands; they were advancing in the direction of the Bull-ring when I first saw them; I saw Wilkes, the prisoner, there; he got on the steps very near me, and the first word he said was 'halt;' the word 'halt' was repeated by the people, and they halted; I heard him tell them to form, and go in a body on the Warwick road; they did go down Smallbrook-street, and those who were going on turned back; I cannot say whether Wilkes went with them or not; as soon as he got off the steps I lost sight of him."

There was no evidence to shew that the prisoner Wilkes was present at the attack on Messrs. Bourne's house and warehouse, though it was proved that, when with the mob at an earlier period, he pointed to the house.

With respect to the local situation of Messrs. Bourne's

house, it was proved by Mr. Griffiths that it was situate in the parish of Birmingham; and that all Birmingham is, except for certain ecclesiastical purposes, one parish, and has one poor's rate and one church rate extending over the whole parish, but that each of the ecclesiastical divisions is called a parish.

LITTLEDALE, J.—I believe the parish of St. Marylebone is all one parish, though it is subdivided into five parishes for ecclesiastical purposes.

Mr. Collison (the clerk of assize) stated, that in indictments respecting offences committed at Birmingham, the parish was always laid as the "parish of Birmingham."

Miller submitted, that as the prosecutor, Mr. Bourne, who ought to best know the situation of his own house, had stated that his house was in the parish of St. Martin, it must be taken to be so.

LITTLEDALE, J.—It is the invariable practice to describe it as the parish of Birmingham; and if this objection is good, all the indictments are wrong.

Miller.—If the practice was wrong, your Lordship would correct it.

LITTLEDALE, J.—I do not mean to say, that because the indictments are wrong they should continue so; but this was originally the parish of Birmingham; and because it is now divided into ecclesiastical divisions, that makes no difference in a case like the present.

Miller addressed the jury for the prisoner Jones.—No doubt the general law of the land is this: if persons are charged with committing an offence with one common and joint intent; if they be all present and near enough to aid and abet in that offence, they are all equally guilty; but the

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present charge is not that they went out intending to do that which was unlawful; not that they went out intending to commit a breach of the peace; not that they went out to create a riot, or to enter into conflict with the London police, against whom great excitement prevailed; but the charge is, that, having assembled for some such riotous purpose, they did together and with one common purpose aid and abet each other in demolishing, or in beginning to demolish, with the intent of effecting that purpose, the house of the prosecutors Messrs. Bourne. If you shall be satisfied that when these persons went down Moor-street their object was to seek for a conflict with the London police, and that all having that object and not having succeeded, and afterwards, when circumstances had arisen which they could not have foreseen, after a portion had gone, and without the concurrence of others, some of them had commenced the attack, and having destroyed certain property by fire, had, for the first time, entertained the intention of destroying the house, then the offence can only have commenced, (so far as the aggravated part of it), when it first occurred to them to commence the demolition of the house: and if persons go out for a purpose that is lawful, and afterwards, without the aiding and assisting of the others, some of them commit an offence, those who went out for the lawful purpose and did not participate in the offence are not guilty of it, even though they were present, unless they encouraged it or were aiding and abetting it; and I should also submit that even if a number of persons go out for an illegal purpose, with the common intention of committing a trespass or a riot, and some of them afterwards commit a felony, those who had gone out to commit the misdemeanor only would not be guilty of the felony unless they aided and abetted the felony. My case is, that there was a feeling of hostility towards the police; and that the prisoner Jones was one of a body of persons who went to the public office for the purpose of assailing the police, and that he

took no part in the demolition, or even in the attack on the house of Messrs. Bourne.

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Daniel, for the prisoner Wilkes, submitted that although there was evidence that the prisoner Wilkes had made use of violent language at Holloway-head, yet that there was fair ground to infer that he had separated himself from the other parties before the attack on the house of Messrs. Bourne.

Campbell, A. G., in reply, submitted, that, from the language and conduct of the prisoner Wilkes, the jury ought to infer that there was a concerted purpose between him and the mob to do mischief, and violate the law; not at some future period, but on that very occasion; and that it was for the jury to say whether the prisoner Wilkes was not a participator in all the unlawful transactions that followed.

LITTLEDALE, J. (in summing up).—T' i indictment is founded on the 8th section of the stat. 7 & 8 Geo. 4, c. 30, by which it is enacted, that if any persons tumultuously assembled, to the disturbance of the public peace, shall unlawfully and with force demolish, pull down, or destroy, or begin to demolish, pull down, or destroy, any church or chapel, &c., or any house, stable, &c., every such offender shall suffer death as a felon. Now it is proper here to remark, that that part of the act that every person committing this offence shall suffer death as a felon, remains in force. Some discussion has occurred, as to the law in cases where persons assemble for a purpose, and afterwards, in the execution of that purpose, a felony is committed; and whether all the persons who were engaged in the original purpose are guilty of that felony, even though they are not proved to have been present at the time when the felony was committed. There is a good deal applicable to this subject in our text-books, which I will state to you. Mr. Serjeant Hawkins, in his Pleas of

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the Crown (*a*), says:—"It seems to have been anciently the more prevailing opinion, that those only were to be adjudged principals in felony, who actually did the fact; as in murder, those only who gave the mortal blow; in rape, those only who actually ravished the party, &c.; and that those in the company who were only present, and abetted and encouraged the doing it, were to be esteemed accessaries, or at most, principals in the second degree only. But I take it to be settled at this day, that all those who assemble themselves together with a felonious intent, the execution whereof causes either the felony intended or any other to be committed, or with an intent to commit a trespass, the execution whereof causes a felony to be committed, and continuing together abetting one another till they have actually put their design in execution; and also all those who are present when a felony is committed, and abet the doing of it, as by holding the party while another strikes him; or by delivering a weapon to him that strikes, or by moving him to strike, are principals in the highest degree, in respect of such abetment, as much as the person who does the fact, which in judgment of law is as much the act of them all, as if they had all actually done it; and if there were malice in the abettor, and none in the person who struck the party, it will be murder as to the abettor, and manslaughter only as to the other. It doth not seem necessary to the making an abettor a principal, that the person on whom the felony is committed should be under any terror from the abetment, and by reason thereof discouraged from making that defence which otherwise he might have made; but it seems to be sufficient for this purpose, that the person who does the fact is encouraged and emboldened in it from the hopes of present and immediate assistance from the abettor, whether he be within view of the fact, or not. And upon this ground it hath been adjudged, That where persons com-

(*a*) 2 Curw. Hawk. c. 29, ss. 7, 8, & 9.

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bined together to stand by one another in a breach of the peace, with a general resolution to resist all opposers, and in the execution of their design a murder is committed, all of the company are equally principals, though at the time of the fact some of them were at such a distance as to be out of view. Also upon the same reason it hath been adjudged, That, where a company of rogues assault a man in the highway, who escapes from them, and then one of them rides from the rest, in the same highway, and robs another out of the view of his companions, and then returns to them, they are all of them equally principals. And the like hath been adjudged in relation to all those who accompany one another with an intent to commit a burglary, in the execution whereof some stand to watch only in the adjacent places, and the rest actually break, and enter the house. But where divers persons accompany one another in the doing of a lawful act, and one of them happens to kill a man, he that gives the wound is only guilty of the homicide, and the rest of the company shall neither be esteemed principals nor accessaries. Also if the act intended, though unlawful, were a bare trespass, and one of the company be guilty of larceny, it is a felony in such offender only, because it is a crime of a nature entirely different from that intended, and not caused by the execution of it." Besides these passages, there are others in Sir W. Russell's work (*a*), in which the authorities are collected, and it is there laid down—"In order to render a person a principal in the second degree, or an aider and abettor, he must be *present aiding and abetting* at the fact, or ready to afford assistance, if necessary; but the *presence* need not to be a strict actual immediate presence, such a presence as would make him an eye or ear witness of what passes. So that, if several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other

(*a*) 1 Russ. C. & M. c. 1.

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purpose unlawful in itself, and each takes the part assigned him; some to commit the fact, others to watch at proper distances and stations to prevent a surprise, or to favour, if need be, the escape of those who are more immediately engaged; they are all, provided the fact be committed, in the eye of the law, present at it; for it was made a common cause with them, each man operated in his station at one and the same instant, towards the same common end, and the part each man took tended to give countenance, encouragement, and protection to the whole gang, and to ensure the success of their common enterprize."

It appears from these passages, that there are cases in our law, where persons setting out engaged in a particular object, and in the promotion of that object a felony was committed, though not originally intended, and where death has ensued, they have been all found guilty of murder or manslaughter (*a*). If, in the pursuit of a common object, a felony is committed, the question arises on these distinctions which I have stated, whether all the parties are guilty of felony, supposing they are proved to be present and engaged with the others in the common design, though they were not present when the felony was committed, provided it was committed by some of those who were the parties engaged in the original design. A distinction has been made, where the original purpose was entirely lawful; where it was to do an act not indictable; where it was to commit a misdemeanor; and where, among other things, it was to do a felonious act; and where expressions were used which shewed a general intent to do mischief, and resist all opposers. I will now consider whether any of these positions are applicable to this case, and I think it will appear that they are not, and that they have no application to the present case. I will, however, point out to you some cases in which questions would arise on the law as

(*a*) See also the cases of *Rex* v. *Edmeads*, ante, Vol. 3, p. 390; *Rex* v. *Hawkins*, Id. p. 392; *Reg.* v. *Whithorne*, Id. p. 394; and *Reg.* v. *Sheppard*, ante, p. 121, and the authorities there referred to.

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laid down by the text writers. Suppose a dozen or twenty persons to determine at a meeting that they would go and kill game; the game may be killed upon their own land, or by leave of the owner of the land; all that is lawful, and there would be no trespass; but if, instead of that, they met for the purpose of going on other peoples' land without their leave, that would be a trespass: or if they went into a free warren, the act of killing game there would be a trespass. Suppose, instead of that, they agreed to go out armed at night to the number of three, and were to take game, that would be a misdemeanor. I will put a fourth case—suppose the intention expressed by them to be to go and steal poultry, and not being provided with a sufficient number of guns, they go and steal guns to be better armed. In the first case, their intention was lawful; in the second, to commit a trespass; in the third, a misdemeanor; and in the fourth, a felony: and if in any one of these cases a conflict happened and death ensued, and it was murder in some of the persons engaged in these pursuits, the inquiry would arise as to the persons who were joining in the original design, but no parties to the murder. However, it appears to me that this doctrine is not, nor are these distinctions any of them applicable to the present case. The first difficulty is, as to who were present at the meeting at Holloway-head, where the original design is said to have been formed; because in the cases put by Serjeant Hawkins, and in the other cases, the parties met for some common design. Then who are the persons who concoct this design? Some come from Holloway-head, some from other places; some joined, and some left. You must not assume that they all assembled at the place from which they set out—suppose 200 met at Holloway-head, and came from that place, the numbers would, no doubt, be increased by others who joined them on the road, and who would know nothing of the original design, and it would be almost impossible to ascertain out of the 2000 persons

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or more that were at Messrs. Bournes', whether any of the persons who were present at the time when the original design was formed, were present or not. Another difficulty then arises, which is, whether any of the persons who were present when the plan was formed, were the persons who actually committed the felony at Messrs. Bournes'. Then arises the further difficulty as to the intent, and in considering the matter with respect to the law as laid down by Mr. Serjeant Hawkins, you must be satisfied as to the intent of the parties when they set out to go to the Bull-ring. Now some might have had an honest and innocent intention of discussing some matter of their own, without anything to constitute an unlawful assembly; though, when they came to the place and continued, it might have become an unlawful assembly. When you come to consider the rules of law which I have stated to you, it is essential that you should be satisfied of the intent of the parties when they set out for the Bull-ring. Some might have intentions perfectly innocent, others might wish to shew their force, and that, in a large assembly of people, might constitute an offence; others might be setting themselves in array, and perhaps opposing themselves to the police; others might intend plunder and burning; but we have no distinct evidence of the intention of those who set the others in motion, or whether they had any distinct or definite plan at all. I therefore think that the law, which says that a man may be convicted of a felony, who was neither present at the time it was committed, nor in any way a party aiding and abetting, but who was a party to a common object, intended for the doing of a particular act, does not apply here. Your attention, therefore, ought to be confined to the particular subject of the felony charged on this indictment; but as applicable to this, as well as every other felony, I am bound to tell you that it is not necessary, to make a party guilty of felony, that his should be the hand by which it is committed. Those who are aiding, abetting,

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and assisting, are principals in the second degree, and are equally guilty with the principals in the first degree, as they encourage them to go on, and prevent other people from hindering them; and it is not necessary that parties aiding should be within view of the fact, if they are so placed as to prevent persons coming to the assistance of the party injured. With respect to the demolishing of the house, the law as laid down by Baron *Gurney*, in the case of *Rex* v. *Batt*, has been very properly cited to you. In that case it appeared that a riotous mob, having a feeling of ill-will against a coal-lumper, went to a house where he kept his pay table, and with menaces of murdering him, they destroyed part of the house, and continued throwing stones at it till they were compelled by the police to desist; and it was decided that they might be convicted of beginning to demolish under the stat. 7 & 8 Geo. 4, c. 30, s. 8, though their principal object was to injure the lumper; provided it was also their object to demolish the house, on account of its being used by him or his men, and although they had not any ill-will against the owner of the house personally. And there is no doubt, that if, their principal object being to injure the individual, they had also the object to demolish the house, they ought to be found guilty of feloniously beginning to demolish, although they had no ill-will against the owner of the house. Baron *Gurney* refers to the case of *Rex* v. *Thomas* (*a*), decided by me. It there appeared that the prisoner and others on the 15th of March, 1830, at about midnight, came to the house of the prosecutor, and that, having in a riotous manner burst open the door, they broke some of the furniture, all the windows, and one of the window frames, and forced out a small iron bar; and that after doing this mischief they went away. It did not appear that there was anything to hinder the rioters from doing more damage if they had chosen so to do. I held in that

(*a*) Ante, Vol. 4, p. 237.

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case, "That this will not be a beginning to demolish, within the act of Parliament, unless the jury shall be satisfied that the ultimate object of the rioters was to demolish the house, and that, if they had carried their intentions into full effect, they would, in point of fact, have demolished it. Now, here that is not so, for they come to do a great deal of mischief, and then go away, having manifestly completed their purpose, and done all the injury they meant to do." A nearly similar rule is laid down by Lord Chief Justice *Tindal*, in a case (*a*) where parties pursued an individual who took refuge in a house, and broke the windows and destroyed the furniture, and then went away; and in the case of *Rex* v. *Batt*, Baron *Gurney* says, "In the case of *Rex* v. *Thomas*, there was nothing to prevent the rioters from going on, and, in favour of life, it was inferred that as they left off voluntarily, they never had any intention of proceeding further. But certainly that is not so here, because there is the interference of the police, and it was after the threats of the police that the mob desisted. If you are of opinion that this mob began to do mischief to the house, intending to persist in demolishing it if they were not interrupted, th offence charged will have been committed." There is no doubt that the rule of law as there laid down is applicable to this case. If part of the object of these rioters was to destroy and demolish this house, and they began to demolish it, they are clearly guilty of this felony. The demolition in this case was by means of fire, and though there is a specific enactment as to arson, yet if burning is the means of the demolition of the house, it is just as much within this enactment as the knocking down of the house by hammers or crow-bars or anything else. If the mob went away without doing any act at all, they would not be guilty of this offence, whatever their intention might be; but if, having once begun it, they are prevented from going on with the act of de-

(*a*) The case of *Rex* v. *Price*, ante, Vol. 5, p. 510.

molition by the interference of the military, I am of opinion that it is a case clearly within this enactment. There was another question made as to whether this house is properly described as in "the parish of Birmingham." It appears to me on the evidence that it is, and I have also looked into the local act (*a*), and am satisfied upon it; and I think that it is not less "the parish of Birmingham," because for some ecclesiastical purposes it is divided into three distinct parishes—St. Martin, St. George, and St. Philip. [His Lordship recapitulated the evidence in the case.] You will say, whether the prisoners, or either of them, either began to demolish the house, or aided or assisted in so doing. If, after having proceeded a certain length, the mob left off of their own accord before the act of demolition was completed, that would be evidence from which a jury might infer that they did not intend to demolish the house; but if they were prevented by the police, or any other force, that would be evidence to shew that they were compelled to desist from that which they had designed, and it would be for the jury to infer that they had begun to demolish within the meaning of this act of Parliament. You must, however, be satisfied that there was a beginning to demolish the house. The shop shutters are not part of the house, they are not part of the freehold, and if all that these persons had done was demolishing the window-shutters, that would not be within this statute. However, it appears here that the house itself is set on fire, and though setting fire to a house is a substantive felony, yet if fire is made the means of attempting to destroy a house, it is as much a beginning to demolish as if any other mode of destruction were resorted to.

The jury found the prisoner Wilkes not guilty, and convicted all the other prisoners.

(*a*) The statute 9 Geo. 4, c. liv. (Loc. & Pers.)

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Campbell, A. G., *Balguy*, *Hill*, and *Waddington*, for the Crown.

Miller, for the prisoner Jones.

Daniel, for the prisoner Wilkes.

[Attornies—*Solicitors of the Treasury & Griffiths*, for the prosecution, and *Wright*, for the prisoners.]

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Every man has a right to give every public matter a candid, full, and free discussion; but although the people have a right to discuss any grievances they have to complain of, they must not do it in a way to excite tumult; and if a party publish a paper on any such matter, and it contain no more than a calm and quiet discussion, allowing something for a little feeling in men's minds, that will be no libel; but if the paper go beyond that, and be calculated to excite tumult, it is a libel.

A defendant was tried for publishing a letter, purporting to be the resolutions of a body of persons calling themselves the General Convention, and in one part of it stated that an outrage had been committed on the people of Birmingham by a force "acting under the authority of men, who, when out of office, sanctioned and took part in the meetings of the people." A witness for the Crown stated in his cross-examination, that he had formerly belonged to the Convention, but had since resigned, and had become a town councillor of Birmingham. It was proposed to ask him further in cross-examination, as to what he said at a meeting at which the Convention was agreed on, but which took place nearly a year before the publication of the alleged libel:—*Held*, that this could not be done.

LIBEL.—The indictment charged, that on the 4th day of July, 3 Vict., at the parish of Birmingham, in the county of Warwick, 10,000 persons unknown, with force and arms, unlawfully did assemble, armed with divers offensive weapons, to wit, sticks, clubs, and daggers, bearing banners and flags, and were then and there making a great noise and disturbance, to the great terror and alarm of the peaceable subjects of our Lady the Queen, and that George Martin and John Hugh Sweeting, together with certain other persons, forming and being part of the London metropolitan police force, having theretofore been sworn in and then being special constables of the Borough of Birmingham, in pursuance of the statute in such case made and provided, did, by the order and direction of William Scholefield, Esq., and John Kaye Booth, Esq., justices of our said Lady the Queen, assigned to keep the peace, disperse, separate, and remove, and and cause and procure to be dispersed, separated, and removed, the said unlawful assembly of persons, and that they the said G. M. and J. H. S., were, together with the said

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other persons forming part of the metropolitan police force, then and there acting in the due execution of their duty as such special constables, in dispersing and causing to be dispersed the said unlawful assembly of persons; and that the defendant intending to excite divers liege subjects of the Queen to resist the laws and to resist the persons so being part of the metropolitan police force in the due execution of their duty, and to bring the said force into hatred and contempt, and to procure unlawful meetings, and to cause divers liege subjects of the Queen to believe that the laws of this kingdom were unduly administered, and intending to disturb the public peace, and to raise discontent in the minds of the subjects of the Queen, and raise and excite tumult and disobedience to the laws, did publish a certain false &c. libel, "of and concerning the said persons so being part of the London metropolitan police, and of and concerning the administration of law and justice within this realm, containing the false, malicious, scandalous, seditious, and libellous matter following, that is to say:—

"Resolutions unanimously agreed to by the General Convention.

"Resolved—1st, That this Convention is of opinion, that a wanton, flagrant, and unjust outrage has been made upon the people of Birmingham by a blood-thirsty and unconstitutional force from London, acting under the authority of men who, when out of office, sanctioned and took part in the meetings of the people, and now when they share in the public plunder seek to keep the people in social slavery and political degradation.

"2nd, That the people of Birmingham are the best judges of their own right to meet in the Bull-ring or elsewhere, have their own feelings to consult respecting the outrage given, and are the best judges of their own power and resources to obtain justice.

"3rd, That the summary and despotic arrest of Dr.

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Taylor, our respected colleague, affords another convincing proof of the absence of all justice in England, and clearly shews that there is no security for life, liberty, or property, till the people have some controul over the laws they are called upon to obey.

" By order, W. LOVETT, Sec.

" Friday, July 5, 1839."

There were other counts in the indictment, which were founded on different portions of the libel.

To prove the prefatory allegations, that there was an unlawful assembly in Birmingham on the 4th of July, 1839, that George Martin and John Hugh Sweeting, and others of the metropolitan police force, were sworn in as constables, and that they by the directions of the magistrates dispersed the mob, Dr. Booth, George Martin, and other witnesses, were called, and stated to the same effect as was proved with respect to those points in the case of *Regina* v. *Neale* (*a*); and it was also proved that by the direction of the defendant 500 copies of the paper set out in the indictment were printed, and 300 of them posted up in various parts of the town of Birmingham.

The libel was read, and at the desire of *Goulburn*, Serjt., for the defendant, Mr. Salt (whose name was on the back of the indictment) was called: he stated that he was a town councillor of Birmingham, and that he had been one of the Convention, but had resigned, and that he was present at a meeting at Holloway-head on the 6th of August, 1838, which was a meeting to agree on the Convention, and that Mr. Alderman Muntz and Mr. Attwood (the member of Parliament) were present, and that a large body of persons were assembled.

Goulburn, Serjt., proposed to ask the witness as to what he said at that meeting.

(*a*) Ante, p. 431.

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Campbell, A. G., for the Crown.—I submit that what the witness then said is not admissible in evidence in the present case. How can language used by Mr. Salt on the 6th of August, 1838, be in the slightest degree relevant to the publication of this libel in Birmingham on the 5th of July, 1839?

Goulburn, Serjt.—The libel arises out of it. It says—"acting under the authority of men who, when out of office, sanctioned and took part in the meetings of the people." I do not put it that it is evidence, because it proves the truth of the placard; but the question for the jury being, whether this is a seditious libel, it is important for the jury to know what has preceded it.

Campbell, A. G.—This is an indictment for libel, which contains introductory averments, which I have called witnesses to prove, and any evidence to contradict those introductory averments is clearly admissible. The evidence proposed to be given does not go to disprove any part of the introductory averments, but merely goes to shew that at some prior time A. B., J. S., or X. Y., have used inflammatory language which was not prosecuted.

LITTLEDALE, J.—The only way in which this could be receivable in evidence is, that the defendant has mentioned in a part of the alleged libel that these men acted on the authority of "persons who, when out of office, sanctioned and took part in the meetings of the people;" and, in order to shew that sanction, Mr. Serjt. *Goulburn* asks Mr. Salt whether he did not say certain things. Now, if the evidence were admissible on that ground, it would be only as proving the truth of the statements of the libel. I therefore think that I ought not to receive the evidence.

The evidence was rejected.

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Goulburn, Serjt., addressed the jury for the defendant, and argued that this publication was not a libel, induced as it was by the conduct of the police; and that the terms of it were not so violent as those that had been made use of by persons who had afterwards filled high situations in this country.

LITTLEDALE, J. (in summing up).—You will first have to consider whether the statement at the commencement of the indictment, that there was an unlawful assembly which was dispersed by the police, be true or not, and if it be true, you will then have to consider whether this publication was or was not a calm and temperate discussion of the events which had occurred; for if the object of it were merely to shew that the conduct of the police was improper, that would not be illegal, because every man has a right to give every public matter a candid, full, and free discussion. If the language of this paper was intended to find great fault with the police force, even that might not go beyond the bounds of fair discussion; and you have to say, looking at the whole of this paper, whether or not it does so. With respect to the first resolution, if it contains no more than a calm and quiet discussion, allowing something for a little feeling in men's minds, (for you cannot suppose that persons in an excited state will discuss subjects in as calm a manner as if they were discussing matters on which they felt no interest), that would be no libel; but you will consider whether the kind of terms made use of in this paper have not exceeded the reasonable bounds of comment on the conduct of the London police. With respect to the second resolution, it is no sedition to say, that the people of Birmingham had a right to meet in the Bull-ring, or anywhere else; but you are to consider, whether the words, that they "are the best judges of their own power and resources to obtain justice," meant the regular mode of proceeding, by presenting petitions to the

Crown, or either house of Parliament, or by publishing a declaration of grievances; or whether they meant that the people should make use of physical force as their own resource to obtain justice, and meant to excite the people to take the power into their own hands, and meant to excite them to tumult and disorder. The third resolution refers to the arrest of Dr. Taylor; and if the arrest of Dr. Taylor was considered to be illegal, the defendant had a right to discuss it in a calm, quiet, and temperate manner; and if Dr. Taylor had been arrested in a manner wholly illegal and improper, we may allow for some warmth of expression. I have already said that the people have a right to discuss any grievances that they have to complain of, but they must not do it in a way to excite tumult. It is imputed that the defendant published this paper with that intent, and if he did so it is in my opinion a seditious libel. It seems that on former occasions a great deal of strong discussion has taken place; but if that be so, it is no justification of the defendant that other libels have been published that have not been prosecuted.

Verdict—Guilty.

Campbell, A. G., *Balguy*, and *Waddington*, for the Crown.

Goulburn, Serjt, for the defendant.

[Attornies—*Solicitors of the Treasury & Griffiths*, for the prosecution; and *Wright*, for the defendant]

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If the manuscript of a libel be proved to be in the handwriting of the defendant, and it be also proved to have been printed and published, this is evidence to go to the jury that it was published by the defendant, although there be no evidence given to shew that the printing and publication were by the direction of the defendant.

If a paper, published by the defendant, has a direct tendency to cause unlawful meetings and disturbances, and to lead to a violation of the laws, it is a seditious libel; and with respect to the intent every one must be taken to intend the natural consequences of what he has done.

LIBEL.—The indictment, which was in precisely the same form as that in the preceding case of *Regina* v. *Collins* (*a*), charged that the defendant did "write and publish, and cause and procure to be written and published," a seditious libel. The libel was the same handbill which was the subject of the indictment, in the preceding case of *Regina* v. *Collins*.

The defendant surrendered in discharge of his bail, and was arraigned at the bar.

Campbell, A. G., for the crown.—As Mr. Lovett defends himself, it would be probably more convenient to him to come to the table rather than stand at the bar. I can have no objection.

The defendant left the bar and took a seat at the table (*b*).

Campbell, A. G., in his opening, suggested that if the defendant had no objection, the witnesses who were called in the case of *Regina* v. *Collins*, to prove the introductory

A. and B. were separately indicted for publishing the same libel. Both indictments containing the same prefatory allegations. A. was tried first, and on the trial of B. such of the witnesses as had been also examined on the trial of A. had (by consent) their evidence read over to them from the Judge's notes, B. being allowed to further cross-examine them.

A defendant, who surrenders to take his trial on a charge of misdemeanor, need not stand at the bar to be tried, but may be allowed a place at the table of the Court.

(*a*) Ante, p. 456.

(*b*) In the case of *Regina* v. *Vincent and Edwards*, ante, p. 275, the defendant Vincent, who conducted his own defence, was allowed to have a place at the table of the Court, although he was in custody under his sentence in the case of *Regina* v. *Vincent and others*, ante, p. 91. The case of *Regina* v. *Vincent and Edwards*, was tried on the Nisi Prius side of the assizes, the indictment having been removed by certiorari. See also the case of *Rex* v. *Carlile*, ante, Vol. 6, p. 636. As to the practice in cases of felony where the party has been on bail, see the case of *Regina* v. *St. George*, post, 483.

averments in the indictment in that case, should be now called, and their evidence read over to them from the learned Judge's notes; the defendant putting any additional questions to them on cross-examination.

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The defendant assented to this proposition; and those of the witnesses who were examined in the case of *Regina* v. *Collins*, were recalled, and the evidence given by each in that case, having been read over to him by the learned Judge, the defendant was asked if he had any further question to put to them in cross-examination (*a*).

It was proved that the manuscript of the alleged libel was in the handwriting of the defendant, and evidence was also given by Mr. Watson, a printer, that he had printed 500 copies from it, 300 of which another witness, named Clarke, proved that he had posted about the town of Birmingham. There was no evidence to connect the defendant with the printing or the posting, except the handwriting of the manuscript.

The alleged libel was read from the manuscript.

LITTLEDALE, J.—What is the evidence of publication? You have proved that the manuscript is in the handwriting of the defendant, but you have not proved that he gave authority to publish it, or to apply to the printer.

Balguy, for the Crown.—I find it laid down (*b*) in this way:—"The publication may be directly proved by evidence that the defendant with his own hand distributed copies of the libel, or exposed its contents, or painted an ignominious sign over the door of another, or took part in a procession carrying a representation of the plaintiff in effigy for the purpose of exposing him to contempt and ridicule, or maliciously read or sung the contents of the libel in the presence of others; all of these facts are direct proofs of the averment that the defendant published the

(*a*) See the case of *Rex* v. *Foster*, ante, Vol. 7, p. 495.
(*b*) 2 Stark. on Ev. 454.

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alleged libel. But it frequently happens that no direct proof can be given of the defendant's agency in the publication of the libel, and resort must be had to indirect evidence, in order to connect him with the libel, and fix him with its publication. The most usual and important piece of evidence for this purpose, consists in proving that the libel published is in the handwriting of the defendant. When the plaintiff has proved this, he has, if the county be not material, made out such a primâ facie case as entitles him to have the contents read in evidence."

LITTLEDALE, J.—In *Sir Francis Burdett's case* (*a*), the main question was as to the county in which the libel was published.

The defendant.—It was proved there that his servant put it into the post-office.

Balguy.—It is further said by a great authority (Lord Holt), in the case of *Rex* v. *Beare* (*b*), that "when a libel is produced, written in a man's own hand, he is taken in the mainer, and that throws the proof upon him, and if he cannot produce the composer, the verdict will be against him." Now, if I prove this paper to be in the handwriting of the defendant, that makes a primâ facie case against him. Being in his handwriting and afterwards being published, is presumptive evidence that he caused it to be published; and the mere fact of its being in his handwriting, followed by a publication, throws it upon him to discharge himself from the presumption that immediately attaches; namely, that he was the party who not only wrote but published it. I do not mean to say that it is conclusive; the defendant may say that his house was robbed and his drawers ransacked, and may prove it, (if the fact were so), and that would rebut the presumption.

(*a*) 3 B. & A. 717; 4 Id. 95. (*b*) Cited 2 Stark. on Ev. 454.

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Waddington, on the same side.—In *Sidney's case*, the paper was found in his desk, and that was held a publication, and that doctrine has since been repudiated; but still there can be no doubt that where a writing is proved in a state of publication, and it be proved to be in the handwriting of the defendant, that is primâ facie evidence that it was published by him. Mr. *Starkie* says (*a*), "The writing, or even printing, a libel does not, however, in any case amount to a publication, but is mere evidence, from which it may be inferred." If there is a publication by some one proved, the proof that the libel is in the handwriting of the defendant is sufficient to throw the negative proof on him.

Balguy.—There is the case of *Rex* v. *Beare* (*b*), and also a case in the ninth volume of Coke's Reports (*c*), in which it was held that a libel being written in the defendant's handwriting is presumptive evidence that the publication was also by the defendant, so as to throw the negative proof on him.

Waddington—Mr. *Starkie* goes on to say, "Though proof that the libel is in the handwriting of the party goes far in fixing him with the publication, he is still at liberty to rebut if he can the strong presumption thus raised against him, by reconciling the fact with his own innocence."

LITTLEDALE, J.—I think upon these authorities that there is sufficient evidence to go to the jury.

The defendant addressed the Jury, and called several witnesses, with a view of disproving the introductory averment of the indictment, that the meeting of the 4th of July was an unlawful assembly, and also with a view of shewing that the policemen used unnecessary violence.

(*a*) 2 Stark. on Ev. 454.

(*b*) 1 Lord Ray. 414; Carth. 407; 2 Salk. 417; Rep. Temp. Holt, 422; 12 Mod. 218.

(*c*) *Lamb's case*, 9 Co. Rep. 59.

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LITTLEDALE, J., (in summing up).—The first inquiry you have to make is, whether the defendant published this paper. If he did not publish it, there is an end of the case altogether. If you are of opinion that he did publish it, you will then have to consider, whether he did so with the intent charged in the indictment; and if he did publish it with that intent, then the question arises, whether it be a seditious libel; and I am bound to tell you that if it is proved to your satisfaction, that the defendant published this paper, and had the intention charged, it is in my opinion a seditious libel. It is for you, however, under a recent act of Parliament, to decide upon the law as well as the facts; but I have told you what is my opinion if you are satisfied as to the publication and the intent. There is in this indictment an allegation that there was an unlawful assembly, which was dispersed by the police: a great deal of evidence has been given to shew that this was an unlawful assembly; and a great deal of evidence has also been given on the part of the defendant with a view of shewing that it was a lawful meeting. With respect to the intent of the defendant, a man must be taken to intend the natural consequences of what he has done; and if this paper has a direct tendency to cause unlawful meetings and disturbances, and to lead to a violation of the laws, that is sufficient to bring it within the terms of this indictment, and it is a seditious libel. With respect to the publication of the paper, it is proved that the paper is in the handwriting of the defendant, and that copies of the paper were printed; but there is no evidence that that was done by the direction of the defendant. However, you are to judge of that, and you will consider on the evidence that has been given, whether the defendant has published this paper or not. If you are of opinion that he has published the paper, then you will inquire whether it is a paper of the character which has been assigned to it. You will first consider, whether the introductory allegations of the indictment are proved;

and if they are, whether the defendant published this paper; and whether he published it with the intent imputed to him by the indictment; and lastly, whether it be or be not a seditious libel; as to which latter question I have already given you my opinion.

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Verdict—Guilty.

Campbell, A. G., *Balguy*, and *Waddington*, for the Crown.

The defendant in person.

[Attornies—*Solicitors of the Treasury & Griffiths*, for the prosecution.]

OXFORD SUMMER CIRCUIT, 1840.

BEFORE MR. BARON PARKE AND MR. JUSTICE WILLIAMS.

ABINGDON ASSIZES.

(*Civil Side.*)

BEFORE MR. BARON PARKE.

DOE on the demise of WILLIS *v.* PERRIN.

EJECTMENT to recover a house, farm, and lands, at Buscot.—It appeared that the defendant rented the premises of the lessor of the plaintiff, as a tenant from year

A notice to quit "on Saint Michaelmas Day," is primâ facie a notice to quit at New Michaelmas; but if the holding be from Old Michaelmas, it will be a sufficient notice to quit at that time.

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to year, and evidence was given to shew that it was a Michaelmas holding. It was also proved that on the 25th of March, 1839, a notice to quit, signed by the lessor of the plaintiff, was served on the defendant. The notice was in the following form:—

"Mr. William Perrin,—I hereby give you notice to quit, and to me deliver up, *on Saint Michaelmas Day next*, the possession of the farm, lands and premises which you hold of me as an under-tenant, situate at Buscot, within the county of Berks, with the appurtenances.

"Dated this twenty-fifth day of March, 1839.

"THOMAS WILLIS."

The day of the demise laid in the declaration was the 1st of April, 1840, and the declaration was of Trinity Term, 3 Vict.

R. V. Richards, for the defendant.—I can shew that the defendant's tenancy began at Old Michaelmas.

PARKE, B.—This is a good notice for either Old or New Michaelmas. Primâ facie it would be for New Michaelmas, but if the holding was from Old Michaelmas, this notice would do for that also.

R. V. Richards cited the case of *Doe* d. *Spicer* v. *Lea* (*a*).

PARKE, B.—That case is very different from the present. I think this notice is sufficient (*b*).

Verdict for the plaintiff.

(*a*) 11 Ea. 312. In that case the defendant had held under a lease, and had continued to hold after the lease had expired. The lease was "to hold from the feast of St. Michael."—Held, that this must be taken to be a holding from New Michaelmas; and that evidence was not admissible to shew that Old Michaelmas was meant; and held also, that a notice to quit at Old Michaelmas, though given half a year before New Michaelmas, was bad.

(*b*) In the case of *Doe* d. *Hinde* v. *Vince*, 2 Camp. 256, it was held,

Ludlow, Serjt., and *Gray*, for the plaintiff.

R. V. Richards, and *Carrington*, for the defendant.

[Attornies—*R. W. Crowdy*, and *Chamberlin*.]

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that a notice to quit "at Michaelmas," generally, is good to determine a tenancy from year to year, from Old Michaelmas; and in the case of *Denn* d. *Willan* v. *Walker*, Pea. Add. Ca. 194, Mr. Justice *Heath* held, that a notice to quit "on Lady-day next" is a good termination of a holding either from Lady-day old or new style.

WORCESTER ASSIZES.

(*Crown Side.*)

BEFORE MR. BARON PARKE.

REGINA *v.* The BIRMINGHAM and GLOUCESTER RAILWAY COMPANY.

THIS was an indictment against the Company for disobeying an order of justices, which had been confirmed at the Quarter Sessions, for constructing a bridge over a road.

Whateley, for the Company, stated that the Company had not come in upon the venire, and that a distringas had issued, under which the sheriff had seized some of the goods of the Company, who did not know what course to take, as he could find no instance of a company indicted eo nomine.

A corporation aggregate, or a railway company, are liable to be indicted for breaches of duty, such as the non repair of bridges, which it is their duty to repair. If they are indicted in Q. B., they can appear by attorney, but if they are indicted at the assizes, *semble*, that they cannot appear there by attorney, but should apply for a writ of certiorari, and appear by attorney in Q. B.; and if they do not, there may be a distress ad infinitum against them.

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PARKE, B.—There are instances of corporations aggregate being indicted for non-repair of bridges and roads ratione tenuræ. The only difficulty is as to how they are to appear. If the indictment were in the Court of Queen's Bench they would appear by attorney; but the question is, whether they can appear by attorney here. At present, I see no other way than by removing the indictment by certiorari, and the Company pleading in the Court of Queen's Bench by attorney. There is no doubt that an indictment lies against a Company, if they will not do their duty. They have no person, and must appear by attorney.

Whateley.—They might be compelled by mandamus.

PARKE, B.—They may also be indicted; and it seems to me that they must have a certiorari, and appear by attorney, or if they do not, there may be a distress ad infinitum (*a*).

Whateley, for the defendants.

[Attorney—*G. Whateley*.]

(*a*) Lord Coke says (1 Inst. 128 (a)), "By the common law the plaintiff or defendant, demandant or tenant, could not appear by attorney, without the King's special warrant, by writ, or letters patent, but ought to follow his suit in his own proper person; by reason whereof there were but few suits." We believe that the first statute that gave parties power to appear in certain cases by attorney, was the stat. West. 1, (3 Edw. 1), c. 42. But in the Abbreviatio Placitorum, (published by the Record Commissioners), p. 20, several entries will be found of parties appearing by attorney (no doubt by the King's license), so far back as the reign of Richard the First; and we have in our possession the chirograph of a fine of 19 Edw. 1, in which the deforciant appears by another person "positum loco suo per breve domini Regis ad lucrandum vel perdendum." In Fitz. N. B. 25 C., it is said, "but it seemeth that the King, by his prerogative, and before the statutes, might give warrant unto a man to make attorney in every action or suit;" and it is also laid down [Id. E.] that "the

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REGINA *v.* GUTTRIDGES, FELLOWES, and GOODWIN.

RAPE.—The prisoner Fellowes, was indicted for having ravished Ellen Conolly; the other three prisoners being charged as principals in the second degree.

The prisoners had been detained from the last assizes (*a*), and before the case was opened, the prosecutrix was called, but did not appear.

On the part of the prosecution, James Owen was called: he said, "On the night of Saturday, the 5th of Oct. 1839, I heard cries of 'murder;' I went to the place the noise came from, and saw five or six young men and a woman; the woman was on her back; the prisoner John Fellowes I noticed particularly; he was *on* the woman; I pulled him off; his clothes were down; I cannot say if he committed the offence at that time; I saw Goodwin with his hand on her mouth; I saw Goodwin take a ring from her finger; he said it was a brass ring, but she said it was a good gold ring; Fellowes said he would give her a shilling, and she said, 'Why don't you give it me;' the woman was hooting 'murder!' several times before I came up; after I came up, she ceased crying 'murder;' her face looked as if she had been crying; I saw her again before the magistrates."

In a case of rape, if it were proved on the part of the prosecution that the party alleged to have been ravished has been kept out of the way by the prisoners, the Judge would allow her deposition before the magistrate to be given in evidence; but where that was not proved, and the prosecutrix was not at the trial, evidence of complaints made by her recently after the outrage was rejected, as such evidence is received as confirmatory evidence only.

On an indictment for a felony, the jury ought not to convict the prisoner of a completely independent and distinct assault.

King by his letters patent may license a man to make a *general attorney in all pleas* moved, and to be moved in whatsoever Courts;" "and also, the King by his letters patent, may grant unto an abbot for the devotion that he oweth to the house, that he may make *a general attorney* for all pleas and in all Courts." And it seems that in ancient times, a subject, either lay or ecclesiastical, might by the license of the King have his *attorney-general*.

In the Year Book, of Mich. Term, 18 Edw. 3, fo. 57, pl. 87, in a case of scire facias, on a quare impedit against the abbey of Beckherlun, (in Normandy), the prior of Okeburn pleads in bar "as *attorney-general* of the abbey;" and in the Abbrev. Rot. Orig. (Vol. 2, p. 223), in the 26 Edw. 3, "Frater Petrus de sancto Botolpho, prior de Okeburn, *procurator generalis et specialis* Abbatis de Bekherlewyn," grants a messuage to the King. So in the Year Book, 39 Hen. 6, fo. 32, pl. 45, T. Brice is mentioned as the "*attorney-general* of the Duke of Norfolk."

(*a*) Ante, p. 228.

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In his cross-examination he stated that neither of the prisoners Guttridge was present at that time.

Several other witnesses were called, from whose evidence it appeared that the prisoners were assaulting and ill-using the prosecutrix at different times on the Saturday evening, and previous to the time spoken to by the first witness.

On the part of the prosecution it was proposed to ask Mrs. Hannah Crofts whether Ellen Conolly did not complain to her the next day.

Godson, for the prisoners.—I submit that that cannot be asked. Evidence of recent complaint is received to confirm the evidence of the prosecutrix, but as she is away her evidence is not before the jury to be confirmed.

PARKE, B.—In *Brazier's case* (*a*), the child who was attempted to be ravished was only five years old, and incapable of taking an oath; and it was there held, that the complaints she made to her mother and another woman on her coming home, were receivable in evidence, as she herself was not heard on oath. What a man says as complaint to his surgeon, is evidence.

Huddleston, for the prosecution.—The child in *Brazier's case* was incompetent to give evidence.

PARKE, B.—I think the safest course will be to reject the evidence, as it is not part of the res gestæ, but merely confirmatory evidence (*b*). At the time of *Brazier's case*, it seems to have been considered, that, as the child was incompetent to take an oath, what she said was receivable in evidence. The law was not so well settled then as it is now.

The evidence was rejected.

(*a*) 1 Ea. P. C. 443.
(*b*) See the case of *Reg* v. *Megson*, ante, p. 420.

Godson.—I submit that there is no case.

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PARKE, B.—I think there is evidence against Fellowes and Goodwin as to the assault.

Godson addressed the jury, and submitted that they ought not to convict the prisoners Fellowes and Goodwin of the assault, unless they were satisfied that a rape was intended and attempted; and that, if they thought that the prisoners were assaulting or ill-using the woman, without any intention to commit a rape, they ought not to convict them of such separate and distinct assault on this indictment (*a*).

PARKE, B. (in summing up).—If it had been proved, on the part of the prosecution, that Ellen Conolly was kept out of the way by the prisoners, I should have allowed her deposition to have been given in evidence against them; but that is not proved. The question is, whether the prisoner Fellowes attempted to have connexion with Ellen Connolly without her consent. If you believe the witness Owen, who says that he pulled him off, there was an attempt. Then, was it without her consent? and on this part of the case it is proved that there were persons present, which even an immodest woman will not consent to, unless she be very abandoned indeed; and there is also this fact, that she cried out "murder" before the witness came up; but on the other hand it is proved, that while she was on the ground, Fellowes said he would give her a shilling, and she said, "Why don't you do so." This might be because she consented, and it might be because she was poor, and glad to get a shilling. If she was a consenting party, the prisoners cannot be guilty of an assault. I quite agree with the learned counsel, that on an indictment for felony, you

(*a*) See the cases of *Reg.* v. *Ellis*, ante, Vol. 8, p. 654.

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ought not, under the late statute, to convict of a completely independent and distinct assault; but only of such an assault as is connected with the felony charged. Here, as it is proved that the prisoner Goodwin had his hand over the mouth of the woman when the witness pulled the other prisoner off her, it will be for you to say, whether the one prisoner did not make an attempt to commit a rape, and consequently assault her; and whether the other prisoner was not assisting him in so doing.

The jury found the prisoners Fellowes and Goodwin Guilty of an assault; and the prisoners Guttridge Not guilty.

Huddleston for the prosecution.

Godson for the prisoners.

[Attornies—*Fellows*, and *B. Shaw*.]

REGINA *v.* MABEL.

A. was indicted for assaulting a policeman in the execution of his duty.—It appeared that the policeman had gone into a public-house where the defendant was having high words with the landlady. The defendant tried to go into a room in the house in which a guest was, and the policeman, without being desired to do so, collared him, and prevented his going into the room, and A. struck the policeman, and several blows passed on both sides.

Held, that if the jury were satisfied that no breach of the peace was likely to be committed by the defendant on the guest in the room, it was no part of the policeman's duty to prevent the defendant from entering it; but, assuming that to be so, if the defendant used more violence than was necessary to repel the assault committed on him by the policeman, the defendant would be liable to be convicted of a common assault.

ASSAULT.—The defendant was indicted for having, on the 9th of July, 1840, assaulted Henry Burton, a constable, in the execution of his duty. There was a second count for a common assault.

The prosecutor Henry Burton was called. He said:—"I have been for seven months in the Worcestershire police force; on the 9th of July I was called into the Talbot, at Upton-on-Severn; I was called in to put an end to a disturbance which the defendant was making; he and the landlady were at high words respecting some change; Mr. Lucy, who was in the bar, interfered, and the defendant

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was in the act of squaring at him when I desired the defendant not to make a disturbance; the defendant, who was at the side of the bar, then attempted to go into the parlour, in which Mr. Smith, a tradesman of Upton, was sitting; as the defendant attempted to pass me, and get into the parlour, I collared him, and prevented his going in; he then struck me, and I immediately took out my staff, and several blows passed, and the defendant was secured, and afterwards taken before the magistrates."

In answer to a question put by *Godson*, for the defendant, the prosecutor said that neither the landlord or landlady had desired him to turn the defendant out of the house.

The evidence of the prosecutor was confirmed by that of Mr. Smith, who stated, in his cross-examination, that he should not have considered it any impropriety if the defendant had come into the room in which he was.

Godson, for the defendant.—I submit that the defendant was justified in striking the policeman, as the defendant had as much right to go into the parlour as Mr. Smith, who was there before him; and the policeman cannot be said to have been in the execution of his duty when he was attempting to prevent the defendant from entering the parlour. It is quite clear that the policeman was not acting by the authority of the landlord or landlady, as he expressly states that he was not desired by either to put the defendant out of the house.

PARKE, B. (in summing up).—The first question is, whether the policeman was in the execution of his duty. He had a right to be within the house, without being called upon either by the landlord or landlady to interfere; but under the circumstances stated by the policeman, he had no authority to lay hold of the defendant, unless you are satisfied that a breach of the peace was likely to be committed by the defendant on the person in the parlour;

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and if you think that it was not, it was no part of the policeman's duty to prevent the defendant from going into the parlour. If you should find that question in favour of the defendant, you will then consider whether the violence used by the defendant, was more than was necessary to repel the assault of the policeman; for if it was you should then find the defendant guilty of a common assault.

Verdict—Not guilty.

Beadon, for the prosecution.

Godson, for the defendant.

[Attornies—*Beale* and *Wilson*.]

See the case of *Wheeler* v. *Whiting*, ante, p. 262, and the cases there referred to.

(Civil Side.)

BEFORE MR. JUSTICE WILLIAMS.

ROBESON and Others *v.* GANDERTON, DAVIS, and ADCOCK.

A. sued B., C., and D. in a *joint* action for an attorney's bill. B. pleaded nunquam indebitatus, and C. & D. suffered judgment by default:—*Held*, that in order to entitle A. to a verdict against B. the jury must be satisfied that there was a *joint* contract with A. by B., C., and D., *jointly*, and that it was not sufficient to shew that there was a *separate* contract between A. and B. only, even though the evidence would have been sufficient to have supported an action by A. against B. alone.

DEBT for an attorney's bill. Plea by the defendant Ganderton, nunquam indebitatus, and as to the other defendants, judgment by default.

It was opened by *Talfourd*, Serjt., for the plaintiff, that in the year 1826, an act of Parliament (*a*) passed for making a new turnpike road from Arrowsmith-gate to join another turnpike road and that this new road was constructed as far as Quarrypit-lane, which adjoined the

(*a*) The stat. 7 Geo. 4, c. xxiii. (loc. and pers.)

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defendant Ganderton's fields, when the work was stopped for want of funds, the lane being spoiled as a road, by the carriage of the materials for the new turnpike road; and that the present plaintiffs were employed to prepare an indictment against the parish of Inkberrow, who were fined £126 for the non-repair of the lane; but the Quarter Sessions having apportioned the fine to be paid, £1 by the parish, and £125 by the turnpike trustees, an indictment was preferred against Mr. Forde the treasurer of the turnpike trust, for nonpayment of the £125, which indictment failed, because the evidence given to shew that Mr. Forde was treasurer was, in the opinion of Baron *Gurney*, (who tried the case), not sufficient to show that he was so, and it was for the law charges of these different proceedings, in which the plaintiffs acted as the solicitors, that the present action was brought.

It was proved that the business had been done, and that the charges were reasonable; and evidence was given to shew that the proceedings were institutcd on the behalf of the defendant Ganderton, but there was very little evidence as to the other two defendants, it appearing that the defendant Ganderton, was the prosecutor of the indictment against the parish, and that the other two defendants appearcd and pleaded to that indictment as being two inhabitants of the parish indicted.

R. V. Richards, for the defendant Ganderton.—The three defendants are sought to be charged on a joint contract, and unless the plaintiff establishes a joint liability in all three defendants, my client is entitled to a verdict; and even if it were shewn that the plaintiffs were employed by Mr. Ganderton alone, that would not be sufficient to entitle the plaintiffs to a verdict in this action.

WILLIAMS, J., (in summing up).—The defendant, by his plea, says that he is not jointly with the other two defend-

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ants indebted to the plaintiff; and it is for you to say on the evidence whether or not he is so jointly indebted. It is my opinion, that, in order to fix the defendant in this action, there ought to be evidence to satisfy you that all the three defendants are jointly liable. If Mr. Ganderton was singly liable, he could be singly sued, but I think that the plaintiffs cannot succeed against him in the present action, unless it be proved to your satisfaction that the plaintiffs were employed by all the three defendants jointly.

Verdict for the defendant Ganderton.

Talfourd, Serjt., and *F. V. Lee*, for the plaintiffs.

R. V. Richards and *Gray*, for the defendant, Ganderton.

[Attornies—*Robesons* and *Tombs*.]

WORCESTER CITY ASSIZES.

(*Civil Side.*)

BEFORE MR. JUSTICE WILLIAMS.

FIRKIN *v.* EDWARDS.

A cause was tried at the assizes on a Monday, the commission day being on the Thursday before. A paper was called for under a notice to produce, which was served on the Saturday before the trial. The attornies on whom the notice to produce was served, and also the party who was their client, lived in the assize town:—*Held*, that the service of the notice to produce was not too late, and that the question in such cases is, whether under all the circumstances reasonable notice has been given.

ASSUMPSIT by the plaintiff as indorsee against the defendant as acceptor of a bill of exchange for £15., drawn by David Evans, payable to his own order, and by him ordered to the plaintiff. Plea, that the defendant

gave the plaintiff three promissory notes, as payment of this bill. Replication, de injuria.

W. J. Alexander, for the defendant, began and called for the three promissory notes, under a notice to produce.

The trial took place on Monday, the 27th of July, and the notice to produce had been served on the plaintiff's attornies on the previous Saturday; the commission day for both the city and county assize at Worcester being Thursday, the 23rd of July. The plaintiff and his attornies all lived in Worcester.

R. V. Richards, for the plaintiff, objected that the notice to produce had been served too late, and that it should be served before the commission day.

W. J. Alexander.—Not where the parties live in the assize town.

WILLIAMS, J.—On the circuit I formerly belonged to (*a*), where assizes lasted a fortnight, notices to produce were very frequently served after the commission day. The question is, whether, under all the circumstances, reasonable notice has been given. I think this will do (*b*).

Secondary evidence of the promissory notes was received; but the defendant failing on other parts of his case there was a

Verdict for the plaintiff.

R. V. Richards and *Whateley*, for the plaintiff.

W. J. Alexander, for the defendant.

[Attornies—*Bedford & Pidcock* and *T. George*.]

(*a*) The Northern Circuit.

(*b*) See the case of *Gibbons* v. *Powell*, post.

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SHREWSBURY ASSIZES.

(*Civil Side.*)

BEFORE MR. JUSTICE WILLIAMS.

MARSH *v.* COPPOCK.

On the trial of an action to recover a £500 penalty for bribery, alleged to have been committed at the election of members of Parliament for the borough of L., which was to be tried by a special jury, the attorney on each side had given to the associate a list of names of certain common jurors whom he did not wish to be called if a tales were prayed. With the omission of those jurors and those who did not appear, there were not sufficient common jurors to make up a full jury when a tales had been prayed:—*Held*, that the case should not stand over, but that all the common jurors should be called over in the usual way, and that no challenge could be allowed except for cause.

Held, also, that it was no cause of challenge that a juror was a tenant of a nobleman whose interest in the borough was supposed to be affected, or that he had been foreman of another jury who had tried another action between other parties for bribery, alleged to have been committed at the same election.

DEBT for a penalty of £500, for bribery at the Ludlow election, in 1839. Plea, nil debet, "by statute."

This was a special jury cause, and a full special jury not appearing, *Talfourd*, Serjt., for the plaintiff, prayed a tales.

The attorney on each side had given Mr. Platt the associate a list of the names of those of the common jurors on the panel, whom he wished not to be called in the event of a tales being prayed.

Mr. Platt, in taking the names from the ballotting-box, whenever he came to a name which was on either of these lists, did not call that name, and with the omission of those persons, and the non-appearance of the others of the common jury, the panel was exhausted, and three more jurors were wanting.

Ludlow, Serjt.—I apprehend that the case must stand over till the next assizes.

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Talfourd, Serjt.—There is no challenge in a civil case except for cause.

WILLIAMS, J.—You must take the first three jurors who appear, unless they are challenged for cause.

Ludlow, Serjt.—I have no objection to try the case by nine jurors.

Talfourd, Serjt.—That would be error.

WILLIAMS, J.—Call over the jury in the ordinary way.

Mr. Platt put all the names of the jurors again into the ballotting-box, and the next juror who answered was Mr. Thomas Beeston.

Ludlow, Serjt.—Mr. Beeston is a tenant of Lord Powis, whose interest at Ludlow is sought to be affected, and whose brother was a candidate at this very election; and, secondly, Mr. Beeston was foreman of the jury in the case of *Hall* v. *Coleman,* tried here on Wednesday last, which was an action for a penalty for bribery at the same election, and therefore he is not indifferent. The object of challenging is that the parties should have a jury who are indifferent.

WILLIAMS, J.—I do not think that either is a sufficient cause of challenge (*a*).

Talfourd, Serjt.—I will waive Mr. Beeston.

Ludlow, Serjt.—That is courtesy.

Mr. Beeston was not sworn on the jury.

A full jury having been sworn, the case was gone into,

(*a*) See the case of *Reg.* v. *Geach,* post, p. 499.

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and on the part of the plaintiff, in addition to the evidence of the person to whom the money was alleged to have been given by the defendant, an examined copy of a record of a judgment of Hilary Term, 1840, was put in. It was in a case of *Coppock* v. *Cook*, which was an action brought by the present defendant against a person named Cook, for a £500 penalty for bribery, in which was judgment for the plaintiff by default.

Ludlow, Serjt.—The plaintiff has made out a defence for the defendant, by shewing that he has made a discovery under the 7th section of the stat. 2 Geo. 2, c. 24, and is therefore indemnified.

R. V. Richards, for the plaintiff.—The person who is plaintiff in another action is not the discoverer: that was decided in the case of *Sibly* v. *Cuming* (*a*). and *Curgenven* v. *Cuming* (*b*).

WILLIAMS, J.—As this would go to a nonsuit, I will give leave to move to enter a nonsuit if the Court of Queen's Bench should be of opinion that this is a good defence for Mr. Coppock; but I wish it to be understood, that I do not express any opinion at all favourable to the validity of the objection.

Verdict for the defendant.

Talfourd, Serjt., *R. V. Richards*, and *Godson*, for the plaintiff.

Ludlow, Serjt., and *Whateley*, for the defendant.

[Attornies—*Bigg & Goldfinch*, and *In person*.]

(*a*) 4 Burr. 2464. (*b*) Id. 2504.

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(*Crown Side.*)

BEFORE MR. BARON PARKE.

REGINA *v.* ST. GEORGE.

If a person intending to shoot another, put his finger on the trigger of a loaded pistol, but is prevented from pulling the trigger, this is not an attempt to discharge loaded arms "by drawing a trigger, *or in any other manner*," within the stat. 1 Vict. c. 85, ss. 3 & 4, as the words "in any other manner" in that statute, mean something analogous to drawing the trigger, which is the proximate cause of the loaded arm going off.

INDICTMENT for feloniously attempting to discharge loaded arms.—The first count of the indictment charged that George Hanbury Farraday St. George, on &c., at &c., "a certain loaded arm, to wit, a pistol, then and there loaded with gunpowder and a leaden bullet, and then and there held in the hands of the said G. H. F. St. George, feloniously, wilfully, and maliciously did present and point, and by then and there drawing the trigger of the said pistol, then and there attempt to discharge it at one Bruce Ernest Alphonso Durant," with intent to murder him; 2nd count, the like, with intent to maim and disable; 3rd count, the like, with intent to do grievous bodily harm; 4th count, that the said G. H. F. St. George, on &c., at &c.,

The applying a lighted match to a loaded match-lock gun, or the striking the percussion cap of a percussion gun, would be sufficient attempts within these enactments.

If a person present a pistol, purporting to be a loaded pistol, at another, and so near as to have been dangerous to life, if the pistol had gone off, *semble*, that this is an assault, even though the pistol were, in fact, not loaded.

On an indictment for a felony, which includes an assault, the prisoner ought not to be convicted of an assault which is quite distinct from the felony charged; and on such an indictment the prisoner ought only to be convicted of an assault which is involved in the felony itself.

A. presented a loaded pistol at B., but was prevented from pulling the trigger:—*Held*, that A. could be properly convicted of this assault, on an indictment for feloniously attempting to discharge loaded arms at B.

A person who surrenders to take his trial on a charge of felony at the assizes, must be tried at the bar of the Court, and cannot take his trial at any other part of the Court, even with the consent of the prosecutor.

On the trial of A., for attempting to discharge loaded arms at B., B., (with a view to discredit his evidence), was cross-examined as to whether he had not used violent language towards his father, which he admitted he had:—*Held*, that on re-examination, B. might be asked as to how his father had acted towards him before he used the language that had been cross-examined to.

It was proposed to ask a witness as to what another witness had said on other occasions, than that which was the subject of the trial:—*Held*, that that could not be done, as what a witness has said at other times, is only matter for the cross-examination of the witness himself.

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"a certain other loaded arm, to wit, a pistol, then and there loaded with gunpowder and a leaden bullet, and then and there held in the hands of the said G. H. F. St. George, feloniously, wilfully, and maliciously, did point and place against and upon the body of the said B. E. A. Durant, and the said pistol, so then and there loaded with gunpowder and a leaden bullet as aforesaid, and so then and there held in the hands of the said G. H. F. St. George, and pointed and placed as aforesaid, did then and there feloniously, wilfully, and maliciously attempt to discharge at and against the said B. E. A. Durant," with intent to murder him; 5th and 6th counts, like the 4th, but laying an intent to "maim and disable him," and an intent "to do grievous bodily harm;" 7th count, that the said G. H. F. St. George, on &c., at &c., "in and upon the said B. E. A. Durant, feloniously, wilfully, and maliciously, did make an assault; and that the said G. H. F. St. George, then and there having in both his hands a certain pistol loaded and charged with gunpowder and one leaden bullet, did then and there, by feloniously putting and placing the thumb and forefinger of his right hand upon the trigger of the said pistol, feloniously, unlawfully, and maliciously attempt and endeavour to discharge the said pistol at and against the said B. E. A. Durant, the said pistol being then and there so loaded and charged with gunpowder and one leaden bullet, as aforesaid, with intent to do the said B. E. A. Durant grievous bodily harm" (*a*).

(*a*) By the stat. 1 Vict. c. 85, s. 3, it is enacted "that whoever shall *by drawing a trigger, or in any other manner* attempt to discharge any kind of loaded arms at any person," "with intent in any of the cases aforesaid, to commit the crime of murder, shall, although no bodily injury shall be effected, be guilty of felony," and be liable to be transported for life, or not less than fifteen years, or imprisoned for not exceeding three years, and by sect. 4, of the same stat. it is enacted, "that whosoever unlawfully and maliciously shall shoot at any person, or shall *by drawing a trigger, or in any other manner* attempt to discharge any kind of loaded arms at any person" "with intent in any

As soon as Mr. St. George came into Court to surrender in discharge of his bail, it was stated by *C. Phillips*, who was one of his counsel, that it was not wished on the part of the prosecutor, that Mr. St. George should go into the dock, and he therefore asked that he might have a seat near his counsel.

PARKE, B.—In a case of felony the party must be tried at the bar. In misdemeanor it is otherwise (*b*).

of the cases aforesaid, to maim, disfigure or disable such person, or to do some other grievous bodily harm to such person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony," and be liable to be transported for life, or not less than fifteen years, or imprisoned for not exceeding three years.

(*b*) In the case of *Reg.* v. *Terence Egan*, Esq., tried at the Huntingdon Spring Assizes, 1839, Capt. Egan surrendered to take his trial on an indictment for larceny. *Kelly*, as his counsel, applied that he should not be tried at the bar of the Court, but should sit with his counsel, as it was necessary that he should instruct them during the trial.—*Tindal*, C. J., refused the application; and said that in a case of felony the prisoner *must* be put to the bar, and that he could make no distinction between one case of felony and another.—*Storks*, Serjt., and *Gunning*, were for the prosecution.—*Kelly*, *B. Andrews*, and *Byles*, for the prisoner; who was acquitted without being called on for his defence.

On the trial by the Peers of Lord Ferrers, in 1760, for the murder of Mr. Johnson [19 St. Tr. 892], and on the trial by the Peers of Lord Byron, in 1765, for the murder of Mr. Chaworth [Id. 1182], the noble prisoner in each case, though a peer, "was brought *to the bar* by the deputy governor of the Tower, having the axe carried before him by the gentlemen gaoler, who stood with it on the left hand of the prisoner, with the edge turned from him; the prisoner, when he approached the bar, made three reverences, and then fell on his knees at the bar." And on the trial of Lord Kilmarnock, and other Peers, for high treason in 1746 [18 St. Tr.], the same forms were observed. In the Duchess of Kingston's case for bigamy, tried by the Peers in 1776 [20 St. Tr. 370], the Duchess was brought *to the bar* by the Deputy Gentleman Usher of the Black Rod (in whose custody she was), and "the prisoner, when she approached the bar, made three reverences, and then fell on her knees at the bar."

On the trial of Mary, Queen of Scots, in the hall of Fotheringay Castle, in 1586, it is stated [1 St.

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Mr. St. George surrendered and went to the bar.

On the part of the prosecution Mr. Bruce Ernest Alphonso Durant was called, he said, "I am the son of Mr. Durant, of Tonge Castle, by his first wife; I am twenty-nine; I recollect the 9th of June; on that day I went home to my house at Neachley, which is a mile from Tonge Castle, by the road, but nearer across the water; my dog appeared to be poisoned; I gave the dog salt and water, and in about three hours I went into my father's grounds; I saw my father, and in about two or three minutes the prisoner came up; I generally call him Bradbury; he is a natural child (supposed to be) of my father;

Tr. 1172], that "at the upper end of the chamber was placed a chair of estate for the Queen of England, under a cloth of estate; over against it below, and more remote, near the transom or beam that ran across the room, stood a chair for the Queen of Scots. At the walls on both sides were placed benches, upon which sat the Lord Chancellor, Lord Treasurer," &c.; and it is not said whether the Queen of Scots was *at the bar*, or within it; but in a drawing of the mode in which the hall of Fotheringay castle was to be fitted up for this trial (which is in the handwriting of the Lord Treasurer Burleigh), and is in the British Museum [Cotton MS. Calig. IX. p. 463], the chair for the Queen of Scots is placed *within the bar*.

On the trial of Charles the First [4 St. Tr. 994], it appears that he was conducted by the Serjeant-at-Arms "strait *to the bar*, having a crimson velvet chair set before him."

These two latter cases are mere matter of history; but as they appear in the State Trials, we have referred to them. On the trial of Lord Melville by the Peers in 1806, on an impeachment for high crimes and misdemeanors [29 St. Tr. 607], Lord Melville had a stool placed for him *within the bar*, and he did not go on his knees; but Mr. Hastings, on his trial by the Peers in 1788, on an impeachment for high crimes and misdemeanors, came and knelt *at* the bar, and was not *within* it, he being a commoner, and not a peer. In those impeachments, Mr. Hastings and Lord Melville respectively put in their answers to the impeachments in a form nearly similar to an answer in Chancery. The answer of Mr. Hastings will be found in the Com. Journ. Vol xliij. p. 32; and that of Lord Melville 29 St. Tr. p. 622. The answer of Mr. Hastings is very long, occupying sixty folio pages in the Commons' Journals. That of Lord Melville is very short, being little more than a plea of not guilty. With respect to persons surrendering to take their trials for misdemeanors, see the cases of *Reg.* v. *Lovett*, ante, p. 461, and *Rex* v. *Carlile*, ante, Vol. 6, p. 636.

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he lives at Tonge Castle; he came up and put his fingers to his nose, and then put his hand on my nose, and used an insulting expression; I had not done anything, or used any provoking gesture; I said 'Father, I am surprised that you should allow your bastard to insult your own lawful child; you used to know how to behave yourself, and knew what language a gentleman should use;' the prisoner said he should like to fight me; I was bound over to keep the peace to his brother; the prisoner jostled me and grinned in my face, and asked me to fight; I was leaning on my stick, and he snatched the stick out of my hand and was going to strike me; I ran in upon him, and, as he could not use the stick, he threw it over my shoulder; my brother gave me my stick again; the prisoner said he should like to give me a good licking; he rubbed his fingers across my nose several times, and then struck me right and left on the left nostril and the body; I said, 'I can stand this no longer, he has struck me and you are witnesses;' I struck at him and missed him, but my wrist struck his chin and knocked him down, and I struck him again as he was falling; as he was getting up he put his hand into his coat pocket and took out a pistol; he instantly put the butt end of the pistol to his chest to cock it; the moment I saw the pistol I put my hand upon it; he pushed the muzzle of the pistol against my trousers, and I unbuttoned three buttons in pushing it away; he had his finger on the trigger, and the pistol was cocked but not full cocked; my hand, I think, prevented him from cocking it; if it had not been for my hand the pistol would have gone off, and I should have been shot through the body; I saw him cock it against his chest; as he fell, he said, 'Blast you, I will finish you,' or, 'I will settle you;' I can't say whether the pistol was on full cock or not; my hand was on the guard, so that the prisoner could not get at the trigger: my brother Augustus and a man named Wedge laid hold of the pistol with me; Wedge said, 'Don't shoot him—don't shoot him;' a man named

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Harley said, 'I will not stand by and see them shot;' he said this to my father's coachman; there was a scuffle between them; Harley endeavoured to take the pistol; I tried to strike the prisoner with my stick; I grazed his hat, but I drew in my blow as my brother's head was in the way, and as the blow fell it struck my brother Augustus's hand.

In his cross-examination Mr. B. E. A. Durant said, (inter alia) "I had been on ill terms with my father, and I did say that my father was a hoary old villain; I told him my mother said she died a murdered woman, and he was starving all her children, and that he ought to be tied to a cart's tail and flogged through the village."

In his re-examination, *Phillimore*, for the prosecution, proposed to ask the witness how Mr. Durant, senior, had acted towards him before he made use of the expressions above mentioned.

Ludlow, Serjt., for the prisoner.—I apprehend that the conduct of Mr. Durant, senior, is not evidence in this case.

PARKE, B.—You have made it so by your cross-examination. To discredit the witness you ask him, whether he did not use violent language towards his father, and he admits that he did; and his counsel to explain that evidence may ask him how his father acted towards him with a view of shewing that the language was not without provocation.

The evidence was given, and the witness stated that his father had locked him up for five or six days, in a room at the top of Tonge Castle, saying that he was deranged, and after that put him to live at a small farm where he was boarded, lodged, and clothed at 10*s*. a-week.

The evidence of Mr. B. E. A. Durant was confirmed by that of his brother Mr. Augustus Durant, who, as to at-

tempting to fire the pistol, said, "The prisoner took out a small pistol, and said, 'I will settle you,' or 'I will do you;' the prisoner either half or full cocked the pistol, and pointed the muzzle at my brother and against his trousers; I rushed at the pistol, and put my right hand over the muzzle of the pistol, and my other hand over the cock; I found the prisoner's finger pulling; his finger was on the trigger; I plainly felt the finger of his right hand on the trigger, and my hand did not allow the trigger to go back; the people interfered, and they were separated."

In the cross-examination of Mr. Augustus Durant, *C. Phillips* proposed to ask him as to what his brother, the prosecutor, had said on other occasions than the time of the alleged offence.

PARKE, B.—I think that that cannot be asked of this witness, and that it is only matter for the cross-examination of the person who is supposed to have used the expressions imputed.

The question was not put.

It was proved that two small percussion pistols were, on the 10th of June, given to the superintendant of police by Mr. St. George, the one loaded with powder and ball and the other with powder and bits of lead.

PARKE, B.—It appears to me that the charge of felony cannot be supported, as it is not proved that the prisoner drew the trigger. The words "in any other manner," in the statute, mean something analagous to drawing the trigger, which is the proximate cause of the loaded arm going off. Suppose, for instance, you had a matchlock, and put a match to it, and the gun did not go off, that would be a case within the act of Parliament; but here is no proof that the prisoner drew the trigger, though he

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put his finger to it, and he cannot, therefore, be convicted on those counts which charge him with so doing, or which charge him with a felonious attempt to discharge the pistol, for it must be an attempt *ejusdem generis*; the consequence is, he cannot be convicted of a felony, but he may be convicted of an assault.

Ludlow, Serjt.—I submit that the prisoner cannot be convicted of an assault, unless the jury are satisfied that the pistol was loaded.

PARKE, B.—It seems to me that it is an assault to point a weapon at a person, though not loaded, but so near, that if loaded, it might do injury. I think the offence of pointing a loaded gun at another does involve an assault, unless it is done secretly; and I think that the presenting a fire-arm, which has the appearance of being loaded, so near that it might produce injury if it was loaded and went off, is an assault.

Phillimore.—The clause in this act says, that if a party shall attempt, by drawing the trigger, *or in any other manner*, to discharge a loaded arm, he shall be guilty of the offence. If, therefore, a man puts his hand on a trigger, in order to fire the pistol, and cannot do it because the pistol happens to be at half-cock, that would, as I submit, be within the meaning of the statute.

PARKE, B.—Here was a trigger to be drawn, and it is not drawn. It seems to me that the object of this act was to punish proximate attempts: that is, those attempts which immediately lead to the discharge of loaded arms; therefore, if a person drew the trigger, and the gun was loaded, in that case the offence would be complete, though the gun did not go off, and though it did not happen to strike the percussion cap; and the act also provides for the case of fire-arms which do not go off with the ordinary lock. Suppose, therefore, a man was to come with a

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matchlock, and attempt to discharge it by putting a fusee or a brimstone match to the touch-hole, that would be an attempt to discharge it within the meaning of this act; and so since the newly-invented fire-arms, if a man with a hammer were to strike the cap, that would be a felony under this act of Parliament; and, as I thought a point of this kind would be taken, I have availed myself of an opportunity which I had of consulting my Brother Williams, who agrees with me in opinion. The question, whether the pistol was loaded or not, will be material with respect to the punishment, but it is not in my judgment necessary to constitute the common law offence that the fire-arm should be loaded, though it is essential to the statutable felony (*a*).

Ludlow, Serjt.—The question of the assault, in point of law, will not depend on the presentation of the pistol merely.

PARKE, B.—My idea is, that the prisoner can only be found guilty under this act of Parliament of that assault which was involved in, and connected with, the presentation of a loaded pistol. Suppose there was a common assault committed in the course of a dispute between the prisoner and the prosecutor, I do not think that the prisoner could be found guilty of that assault on an indictment charging him with felony. I had occasion to lay down the same rule in a case at Worcester (*b*), which was the case of an assault upon a female. There was some question about

(*a*) In the case of *Rex* v. *Carr*, R. & R. C. C. 377, it was held, that in order to constitute the felony of attempting to discharge a loaded fire-arm under the stat. 43 Geo. 3, c. 58, (now repealed), the fire-arm must have been so loaded as to be capable of doing the mischief intended. But in the case of *Rex* v. *Elliott*, O. B. 1787, cited 1 Russ. C. & M. B. 3, ch. 10, it was held to be sufficient if that fact appeared from the general circumstances of the case. See also the case of *Reg.* v. *Coates*, ante, Vol. 6, p. 394.

(*b*) The case of *Reg.* v. *Guttridge*, ante, p. 47.

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the crime itself having been committed, but there was no doubt that a great number of assaults had been committed in the course of the same evening; the learned counsel for the prisoner suggested that if the jury were not satisfied of the assault, which was connected with the felony charged, the prisoner could not be found guilty of other assaults committed on the same evening, which were unconnected with the crime, aud I was of that opinion. It appears to me that the prisoner can only be found guilty of the assault involved in the felony charged.

Ludlow, Serjt.—Of the assault, which would be an ingredient in the crime.

PARKE, B.—The crime charged here is an attempt to discharge a loaded pistol; if a pistol was presented close to the person of the prosecutor, that is an assault, and it is included in the charge.

Ludlow, Serjt. —That renders it unnecessary for me to advert to anything besides the presentation of the pistol. I need not refer to the other acts which were done.

PARKE, B.—Nor to the blows.

Ludlow, Serjt.—It is necessary that the pistol should be a loaded pistol.

PARKE, B.—I think not.

Ludlow, Serjt.—There was an action tried at Oxford, in which Mr. Justice *Erskine* laid down the law, that it would not amount to an assault unless the pistol was loaded. It did not accord, certainly, with my views at the time, and I obtained a verdict on the other points in the case.

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PARKE, B.—I do not know that I should have felt much difficulty about it, but for the high authority which you have cited. My idea is, that it is an assault to present a pistol at all, whether loaded or not. If you threw the powder out of the pan, or took the percussion cap off, and said to the party, "This is an empty pistol," then that would be no assault; for there the party must see that it was not possible that he should be injured; but if a person presents a pistol which has the appearance of being loaded, and puts the party into fear and alarm, that is what it is the object of the law to prevent. I think that if, in this case, it should be proved that the prisoner presented a pistol purporting to be a loaded pistol, and the jury are satisfied that it was so near as to produce danger to life if the pistol had gone off, that that would be an assault in point of law, and that the prisoner might be convicted of that assault upon this indictment (*a*).

His Lordship left the case to the jury as to the assault, and desired them to inform him whether the pistol was loaded, and whether it was presented at the prosecutor so near him as to have seriously injured him if it had been discharged,

Verdict — Guilty of an assault; the foreman of the jury adding, "We think that he presented the pistol with intent to discharge it, the pistol being loaded."

Talfourd, Serjt., *R. V. Richards*, and *Phillimore*, for the prosecution.

Ludlow, Serjt., *C. Phillips*, and *Allen*, for the prisoner.

(*a*) See the cases of *Reg.* v. *Lewis*, post, p. 523; and *Blake* v. *Barnard*, post.

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HEREFORD ASSIZES.

(Civil Side.)

BEFORE MR. BARON PARKE.

Doe on the several Demises of Hughes and Corbett *v.* Derry.

A., being owner of a farm, let it for seven years to B.; and by a written agreement of the same date it was agreed, that A. should manage the farm for B., B. allowing A. 12*s.* a week, "and allowing him and his family to reside and have the use of the dwelling-house and furniture therein, free of rent," and this agreement was to be put an end to by three months notice or three months wages:—*Held*, that this agreement did not require a lease stamp, as it did not contain a demise of the house, the occupation of it being a mere remuneration for services:—*Held*, also, that no notice to quit was necessary, if the service was put an end to.

Whether in ejectment the lessor of the plaintiff must have a certificate under the stat. 3 & 4 Vict. c. 24, to entitle him to costs—*quære*.

EJECTMENT to recover a farm at Bishop's Frome.

It appeared that the farm had originally belonged to the defendant, and that by a written agreement, dated on the 10th of December, 1838, the defendant, as owner, and Mr. Holland, as mortgagee, had let the farm to Mr. Corbett, one of the lessors of the plaintiff, for seven years; and on the same day Mr. Corbett and the defendant entered into the following agreement:—

"An agreement made the 10th day of December, 1838, between John Fletcher Corbett, of the city of Worcester, gentleman, of the one part, and Nathaniel Derry of Bishop's Frome, in the county of Hereford, farmer, of the other part, as follows: The said N. D. agrees with the said J. F. C. to manage the farm at Bishop's Frome, now in the occupation of the said N. D., which he has this day, with the consent of the mortgagee, let to the said J. F. C. from the the 25th of December, on the following terms, namely, the said N. D. is to manage and take care of the stock and crop on the said premises, and the team of horses, and do every necessary work on the said farm, and the wife of the said N. D. is to manage the dairy thereon for the said J. F. C., the said J. F. C. paying or

allowing to the said N. D. the sum of 12*s.* per week, and *allowing him and his family to reside and have the use of the dwelling-house and furniture therein, free of rent*, and the said N. D. hereby agrees to the terms above mentioned, either party to put an end to this agreement on giving three months' notice, or paying or receiving three months' wages, the said N. D. to keep and render monthly to the said J. F. C. a just and true account of all articles sold and monies received and paid by him the said N. D., on account of the said J. F. C., relating to the said farm. As witness the hands of the parties the day and year aforesaid.

JOHN FLETCHER CORBETT.
NATHANIEL DERRY.

This agreement bore a £1 stamp.

Gray, for the defendant.—I submit that this paper cannot be received in evidence, as it does not bear a 1*l.* 15*s.* stamp. It is a lease, and the stamp of £1 on leases at a rent under £20 applies to money rents under that amount; and this not being for a rent in money the stamp of 1*l.* 15*s.* is necessary under the provision as to leases not otherwise charged.

PARKE, B.—If this be a lease the stamp is not sufficient; it should be 1*l.* 15*s.* But it seems to me that this is not a lease at all, and that this is only a mode of remunerating the defendant as bailiff. The words "allowing him and his family to reside and have the use of the dwelling-house," might import a lease; but, I think, taking the whole of the instrument together, they must be taken to be a reward for services.

The agreement was received in evidence.

It was proved by Mr. Corbett, jun., that on the 14th of December, 1839, (which was more than three months be-

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fore the present ejectment), he, by the direction of his father, the lessor of the plaintiff, told the defendant he must seek a fresh master and a fresh house at Lady-Day.

PARKE, B.—I don't think that notice to quit was necessary, if the service was put an end to. The plaintiff is entitled to a verdict on the second demise.

Whitmore, for the plaintiff.—I have evidence on the other demise.

PARKE, B.—You cannot recover on both.

Verdict for the plaintiff on the second demise, and for the defendant on the first (*a*).

Whitmore applied for a certificate under the stat. 3 & 4 Vict. c. 24, that a right came in question.

PARKE, B.—I will give it, as there may be a question whether it is necessary (*b*).

(*a*) A verdict of this kind for defendant gives him some small amount of costs. See ante, Vol. 8, p. 358.

(*b*) By the stat. 3 & 4 Vict. c. 24, s. 1, the stat. 43 Eliz. c. 6, "so far as it relates to costs in actions of trespass or trespass on the case;" and so much of the stat. 22 & 23 Car. 2, c. 9, "as relates to costs in personal actions," are repealed; and by sect. 2 of the stat. 3 & 4 Vict. c. 24, it is enacted, "that if the plaintiff in *any action of trespass, or trespass on the case*, brought or to be brought in any of her Majesty's Courts at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Common Pleas at Durham, shall recover by the verdict of a jury *less damages than forty shillings*, such plaintiff shall not be entitled to recover or obtain from the defendant, in respect of such verdict, *any costs whatever*, whether it shall be given upon any issue or issues tried, or judgment shall have passed by default, unless the judge or presiding officer before whom such verdict shall be obtained shall *immediately* afterwards *certify* on the back of the record, or on the writ of trial or writ of inquiry, that the action was really brought *to try a right* besides the mere right to recover damages for

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ASSUMPSIT for the board and lodging of the defendant's illegitimate child. Plea, non assumpsit.

It appeared that the child had been placed with the plaintiff by the defendant, in the year 1831, at 2*s*. a-week, and it was admitted that the amount had been paid, down to the month of April, 1838. It was proved that the child had remained with the plaintiff down to April, 1839, and evidence was given of a conversation in the month of May, 1839, in which it was alleged that the defendant had promised payment of the amount claimed.

For the defendant, witnesses were called who stated that in April, 1838, the defendant paid the plaintiff up to that time, and that the defendant then said the plaintiff was to give up the child either to Mr. Parkes or the union, for he would pay no longer. Evidence was also given, that on several occasions when asked for payment, the defendant refused to pay anything, and there was also contradictory evidence as to the conversation in May, 1839.

No one is bound to pay another for maintaining his children, either legitimate or illegitimate, except he has entered into some contract to do so.

Every man is to maintain his own children as he himself shall think proper, and it requires a contract to enable another person to do so, and charge him for it in an action.

PARKE, B., (in summing up).—No one is bound to pay

the trespass or grievance for which the action shall have been brought, or that the *trespass or grievance* in respect of which the action was brought was *wilful and malicious*." And by sect. 3 of the same statute it is provided and enacted, "that nothing herein contained shall extend to, or be construed to extend to, deprive any plaintiffs of costs in any action or actions brought for a *trespass* or trespasses over any *lands*, *commons*, *wastes*, *closes*, *woods*, *plantations*, *or inclosures*, *or for entering into any dwellings*, *outbuildings*, *or premises* in respect of which any *notice not to trespass* thereon or therein shall have been previously served, by or on behalf of the owner or occupier of the land trespassed over, upon or left at the last reputed or known place of abode of the defendant or defendants in such action or actions."

It should be observed, that these provisions only extend to actions of *trespass* and *trespass on the case*, and not to any other form of action; but ejectments being "actions of trespass in ejectment" [3 Bl. Com. ch. 11] it may be a question whether they are or are not included in these provisions.

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another for maintaining his children, either legitimate or illegitimate, except he has entered into some contract to do so. Every man is to maintain his own children as he himself shall think proper, and it requires a contract to enable another person to do so, and charge him for it in an action. In the present case there had been a contract in 1831, which was put an end to in 1838. However, on the part of the plaintiff, it is contended that a new contract is to be inferred from the conversation with the defendant in the year 1839. This is for you to consider. But you must also bear in mind that the defendant has on several occasions distinctly refused to pay anything, and that as to one of the conversations, the evidence is contradictory (*a*).

Verdict for the defendant.

(*a*) In the case of *Mortimore* v. *Wright*, Law Journ. Vol. ix. Exchequ. p. 158, it was decided that a father is not liable for debts incurred by his son while under age, unless he has given an authority to the son to incur them, or has contracted to pay them; and that the moral obligation that he is under to provide for his children imposes no such liability; and in that case Lord *Abinger*, C. B., said, "In point of law a father who gives no authority, and enters into no contract, is not liable for goods supplied to his son, any more than an uncle, a brother, or a stranger would be. If a father does any specific act, from which it may be reasonably inferred that he has authorized his son to contract a debt, then he may be liable in respect of the debt so contracted; but the mere moral obligation upon a father to maintain his child (which I by no means dispute) affords no inference of a promise to do so, and I think we ought to be careful not to put upon his acts an interpretation which abstractedly, and without reference to such moral obligation, they do not warrant. In order to bind a father for a debt incurred by his son, you must prove that he has contracted to be bound in the same manner that you would prove such a contract against any other person, and it ought not to be left to juries to make the law in each particular case according to their own feelings or prejudices; for that would be to permit the law to be frittered away." And *Parke*, B., said, "It is a clear principle that a father is not under any legal obligation to pay his son's debts unless be has contracted to do so, except, perhaps, under the 43 Eliz., by which he may, under certain circumstances, be compelled to support his children according to his ability. A mere moral obligation can impose upon him no such legal liability." "Whatever the moral obligations of parties may be, juries must not be allowed to make

F. V. Lee and *Hoskyns*, for the plaintiff.

Godson, for the defendant.

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[Attornies—*Higgins and Pugh.*]

them contract without legal evidence." In the case of *Mortimore* v. *Wright* the authority of the cases of *Law* v. *Wilkin*, 6 A. & E. 718, and *Nichole* v. *Allen*, ante, Vol. 3, p. 36, was much questioned by Lord Abinger, and in the same case *Rolfe*, B., expressed a doubt, whether in the case of *Blackburn* v. *Mackey*, ante, Vol. 1, p. 1, there was any evidence to go to the jury. See the cases of *Fluck* v. *Tollemache*, ante, Vol. 1, p. 5; *Cameron* v. *Baker*, Id. p. 268; and *Rolfe* v. *Abbott*, ante, Vol. 6, p. 286.

REGINA *v.* GEACH.

FORGERY.—The prisoner was charged with having forged and also with having uttered a forged acceptance on a bill of exchange.

The prisoner pleaded to the indictment, but before any of the jury were called, the prisoner said, "At the beginning of the present year I was concerned for a very serious offence (*a*); great prejudice was excited, and that has extended itself to me, and the way in which the present jury has been impanelled realises my worst fear. In *Bolam's case* (*b*), the trial was postponed, in order to give

If on the trial of a case of felony the prisoner peremptorily challenge some of the jurors, and the counsel for the prosecution also challenge so many that a full jury cannot be had, the proper course is to call over the whole of the panel in the same order as before, only omitting those who have been peremptorily challenged by the prisoner, and as each juror then appears, for the counsel for the prosecution to state their cause of challenge, and if they have sufficient cause and the prisoner does not challenge, for such juror to be sworn.

It is no cause of challenge of a juror by the counsel for the prosecution in a case of felony, that the juror is a client of the prisoner who is an attorney.

Nor that the juror has visited the prisoner as a friend since he has been in prison.

In a case of felony, after a prisoner has challenged twenty of the jurors peremptorily, he may still examine any other of the jurors (who are subsequently called) as to their qualification.

If a person knew the acceptance of a bill of exchange to be forged, and uttered it as true, and believed that his bankers, to whom he uttered it, would advance money on it, which they would not otherwise, that is ample evidence of an intent to defraud, and evidence upon which a jury ought to act; and a person is not the less guilty of forgery because he may intend ultimately to take up the forged bill, and may suppose that the party whose name is forged will be no loser, and the fact that the bill has been since paid by the prisoner will make no difference, if the offence has once been complete at the time of the uttering.

(*a*) The high treason cases on the Monmouth special commission.

(*b*) Bolam was tried at Newcastle, before Baron *Maule* in the

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the sheriff time to summon double the number of jurors; and it being represented to Baron *Maule*, that twenty-five of the jurors came from the immediate neighbourhood, his Lordship directed that they should not be called. Newport and Pontypool were the places in which the peaceable inhabitants were most alarmed by the late disturbances, and forty-one out of the sixty jurors in the present panel are from that neighbourhood."

PARKE, B.—Yours is a very different case from Bolam's. It is impossible that there should be any prejudice against you, as the attorney of Mr. Frost.

The prisoner.—Only a fortnight ago there was a report of my examination, and in it negatives were put for affirmatives.

PARKE, B.—I am unwilling to deviate from the usual practice. The Jury will not connect your case with those in the Spring.

The prisoner.—In *Watson's case* (*a*), 300 jurors were summoned, and in *Bolam's case* 150; and if the Crown challenge a considerable number, they will drive me to be tried by those who are prejudiced against me.

PARKE, B.—This case must proceed in the ordinary way. The Crown may challenge without showing cause till the panel is gone through, and if there is not a full jury they must shew cause. I much regret that the established practice has been ever deviated from, as it leads to those instances being quoted as precedents.

The jury panel contained the names of sixty jurors, of

summer of 1839, for the murder of Mr. Milley. The prisoner and deceased were both clerks in the Savings' Bank at Newcastle.

(*a*) 32 State Trials, p. 2, 2 Stark. N. P. C. 116.

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whom one was excused at the commencement of the assizes, and the whole panel was called over by Mr. Bellamy, the Clerk of Assize, from the beginning to the end in regular order commencing with the name which stood No. 1 on the panel. When the panel had been gone through, the prisoner had challenged thirteen jurors peremptorily; and the Crown had challenged thirty-seven without shewing any cause, some of the remaining jurors who were called did not answer to their names, and when the panel had been gone through there was not a full jury.

Ludlow, Serjt., for the prisoner.—The first juror should be called who was challenged for the Crown.

Mr. Bellamy.—The juror No. 1 on the panel was challenged by the prisoner.

PARKE, B.—The proper course will be to call the panel over in the same order as before, calling those who did not answer before, and omitting to call those who have been already peremptorily challenged by the prisoner.

On the second calling over of the panel, Mr. Gilbert, who had been challenged by the Crown, answered to his name and appeared.

PARKE, B.—Mr. *Richards*, have you any cause of challenge as to Mr. Gilbert?

R. V. Richards.—My cause of challenge is that Mr. Gilbert is a client of the prisoner.

PARKE, B.—That is no sufficient cause of challenge.

Mr. Gilbert was sworn on the jury.

Mr. Lewis, who had also been challenged for the Crown, answered to his name and appeared.

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R. V. Richards.—Mr. Lewis has been visiting the prisoner as his friend since he has been in prison.

PARKE, B.—That is no good cause of challenge.

Mr. Lewis was sworn on the jury.

The prisoner.—I have not seen Mr. Lewis.

Some more jurors were peremptorily challenged by the prisoner; and Mr. Bellamy then informed the Court that the prisoner had peremptorily challenged twenty of the jurors.

Mr. Morris, a juror who was called, answered to his name, and appeared.

PARKE, B.—The prisoner having now challenged his full number peremptorily, if this person is challenged on either side, it can only be for cause.

The prisoner—May I examine him as to his qualification?

PARKE, B.—Certainly.

Mr. Morris stated his qualification to be leasehold, of more than sufficient value, and he was sworn on the jury (*a*).

A full jury having been sworn, the prisoner was given in charge in the usual manner.

It appeared that the prisoner, who had been for some

(*a*) The leading authority on the subject of challenges is that of Lord *Coke*, [1 Inst. 155 a. et seq.]; and it is referred to as being so by Lord *Hale*, [2 H. P. C. 272]; Lord Chief Baron *Comyns*, [Com. Dig. Tit. Challenge, C. 2.]; and Mr. Serjt. *Hawkins*, [2 Cur. Hawk. ch. 43. Several decisions as to challenge of jurors are referred to in Mr. Jardine's Index to the State Trials, tit. "Challenge;" and a summary of the law on this subject will be found in Burn's Justice, Vol. 3, tit. "Jurors."

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years an attorney at Pontypool, had, in the year 1831, opened a banking account with Messrs. Williams, who are bankers at Newport, and that from that time to the year 1838, Messrs. Williams had discounted bills for him to a very large amount, and that on the 28th of July, 1837, the prisoner sent them the bill of exchange in question, of which the following is a copy :—

"1057*l.* 16*s.* 9*d.* Pontypool, July 27th, 1837.

"One month after date pay to my order one thousand and fifty-seven pounds, sixteen shillings. and nine-pence, for value received.

"W. F. GEACH.

Across the bill was the following acceptance :—

"Accepted at Messrs. Cox, Biddulph & Co., Bankers, London.

"EDMUND WILLIAMS."

It was proved by Mr. William Williams, one of the bankers, that this bill came to them in a letter from the prisoner, and was discounted by their firm for him. In his cross-examination, Mr. William Williams said, "We should not have advanced money to the prisoner on his own credit; he never asked it; since the bill in question was paid to us, we have had other bills from the prisoner, more than equal to the amount; Mr. Geach did not have back his satisfied securities, they were left with us; he had any that he chose to send for." Several letters of the prisoner to Messrs. Williams were given in evidence, and in them the prisoner stated that Mr. Edmund Williams had consented to give him (the prisoner) his bills for 2000*l.*, and that Mr. Edmund Williams owed him 2500*l.*, and interest on a mortgage property sold to Mr. Guest; but it was proved by Mr. Edmund Williams, that the acceptance was neither written by him nor by his authority; that he never owed the prisoner 2000*l*, nor any sum at all except for business done by the prisoner as an attorney, nor ever

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sold any property to Mr. Guest. It also appeared, that the prisoner had become bankrupt in 1838, and that Messrs. Williams had proved other bills under the fiat.

Ludlow, Serjt., addressed the jury for the prisoner.—The bill, which is the subject of the present indictment, has been satisfied, and has become waste paper; and is it not too hard to rake up the ashes of this bill for the purpose of overwhelming a young man who has already had the misfortune to become bankrupt? If it were to be taken that this was not a genuine acceptance, and that Mr. Geach uttered it without being able to shew that he had fair grounds to believe that he might use Mr. Williams's name, there remains the still more important question, whether Mr. Geach had any intent to defraud. It has been said that the inference of fraud is an inference of law. For example, if one person fired a pistol at another, and killed him, it would be an inference of law that he intended to do so; but yet that inference might be rebutted by the surrounding circumstances, as by shewing that the pistol went off by accident, or the like. Here is a person in credit, who wanted no other names to enable him to get money at this bank. The bill was paid in and was discharged without any application to any one, and it lay for two years at the bankers among Mr. Geach's vouchers, which he might have called for at any time that he chose. If it is a fair argument that if a fraud has been committed, a fraud was intended; so it is equally a fair inference, that if no fraud has been committed, no fraud was intended. That no fraud has been committed in this case is clear, as the bankers have been paid, and Mr. Edmund Williams has never been called upon. Here is an alleged forgery in 1837; a bankruptcy in 1838, when all the transactions of Mr. Geach must have been gone into, and yet Mr. Geach has remained in the country. Was that the conduct of a guilty man? The *malus animus*—the guilty mind, is what creates the offence, and yet Mr. Geach has

invited the bankers to go before the commissioners, and exhibit their bills, of which this was one. Taking it for granted that the primâ facie inference of guilt arises from the issue of a forged document, yet it is for the jury to say on the whole of the case whether that presumption is rebutted.

PARKE, B., in summing up.—Upon the questions, whether the acceptance is a forgery, and whether the prisoner knew it to be so, there can be no question, if you believe the evidence of Mr. Edward Williams; and with respect to the intent to defraud, I have no doubt that you will take the law from me, which is this, that a person is guilty of forgery, notwithstanding he may himself intend ultimately to take up the bill, and may suppose that the party whose name is forged will be no loser. If, in the present case, you are satisfied that the prisoner knew this acceptance to be forged, and uttered it as true and believed that the bankers would advance money on it, which they would not otherwise do, that is ample evidence of an intent to defraud, and evidence upon which a jury ought to act. It appears that this bill has since been paid by the prisoner; but that will make no difference, if the offence has been once completed at the time of the uttering.

Verdict—Guilty. (*a*).

R. V. Richards, *C. Phillips*, and *W. J. Alexander* for the prosecution.

Ludlow and *Talfourd*, Serjts., for the prisoner.

[Attornies—*G. S. Ford* and *Crosby*.]

(*a*) See the cases of *Reg.* v. *eard*, ante, Vol. 8, p. 143; *Reg.* v. *Hill*, Id. p. 274; and *Reg.* v. *Cooke*, Id. pp. 582, 586.

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GLOUCESTER ASSIZES,

(*Civil Side.*)

BEFORE MR. BARON PARKE.

LAMBERT *v.* HALE.

If an insolvent debtor in his schedule describe a debt due by him to be for "drawing deeds," that will be taken to include not the mere drawing only, but also the stamps, journeys, taking instructions, and every thing else respecting them.

If in assumpsit the defendant plead his discharge under the Insolvent Debtors Act, and no other plea, and the plaintiff by his replication deny the plea, the defendant must begin.

If an insolvent in his schedule state a debt due from [redacted] to be £10, [redacted] really £52, whether this mis-statement, if arising from mistake, be aided by the 63rd section of the Insolvent Debtors Act, 7 Geo. 4, c. 57—*Quære.*

ASSUMPSIT for work and labour.—Plea, that the defendant was discharged under the Insolvent Debtors Act.

Replication, denying the plea.

PARKE, B.—On these pleadings the defendant must begin.

It was opened by *Thomas*, for the defendant, that the plaintiff was an attorney at Chalford; and that the defendant, when discharged under the Insolvent Debtors Act, in the year 1837, had inserted the plaintiff's debt in his schedule as being about 10*l.*, and that it was to be contended on the part of the plaintiff, that that was no answer to the present action, as the plaintiff now claimed 32*l.* 7*s.* 6*d.*, and not 10*l.* He submitted that if it were really the same debt, and the amount had been inaccurately stated from mistake, the discharge of the defendant under the Insolvent Debtors Act was a bar to the present action; and that if the debt was put in the schedule at too small a sum, the plaintiff should have got it rectified by the Insolvent Debtors Court under the 35th sect. of the Insolvent Debtors Act, 7 Geo. 4, c. 57. He relied on the 63rd sect.

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of the statute as to debts being inaccurately described in the schedule of insolvents (*a*).

The order for the defendant's discharge under the Insolvent Act, dated the 28th of June, 1837, was put in, and also the defendant's petition and schedule, filed on the 24th of May, 1837. In the schedule the plaintiff's debt was thus described:—

Names and Descriptions of Creditors and Claimants, and their present or last Residences.	Amount. £. s. d.	When contracted.	Admitted or disputed.	*Nature and Consideration of the Debt and Securities, if any, also if the Debt is disputed the Reason thereof.*
Mr. W. T. Lambert, attorney, Chalford, Gloucestershire.	About £10.	1836.	Admitted.	For drawing deed of assignment and other documents.

PARKE, B.—This, primâ facie, answers any demand up to May, 1837.

M'Lean, for the plaintiff.—The claim of the plaintiff is 32*l.* 7*s.* 6*d.* for drawing and engrossing deeds, and for stamps, letters, journeys, &c.; and the items relating to the deed of assignment alone are 10*l.* 6*s.* 7*d.* The 63rd section of the Insolvent Debtors Act could never be intended to apply to a case like this, the expression in that Act being, when the amount "is not exactly the

(*a*) In that section, after reciting that "whereas it may sometimes happen that a debt of, or claim upon, or balance due from such prisoner aforesaid may be specified in his or her schedule so sworn to as aforesaid, at an amount which is not exactly the actual amount thereof, without any culpable negligence or fraud or evil intention on the part of such prisoner;" it is enacted, "that in such case the said prisoner shall be entitled to all and every benefit and protection of this Act; and the creditor in that behalf shall be entitled to the benefit of all the provisions made for creditors by this Act, in respect of the actual amount of such debt, claim, or balance, and neither more nor less than the same, to all intents and purposes, such error in the said schedule notwithstanding."

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actual amount." I admit that a small variation of amount might not vitiate the description; but if a difference between 10*l.* and 32*l.* is to be allowed to pass, there is no reason why a person might not put down 5*l.* in the schedule when 500*l.* was due. In the case of *Taylor* v. *Buchanan* (*a*), it was held, that the discharge only relieves the party from such specific debts as are described in the schedule, and in that case a debt of 44*l.* was described in the insolvent's schedule as 8*l.*, and the Court held that by this only 8*l.* of the debt was extinguished. That case was decided on the Insolvent Debtors' Act, 1 Geo. 4, c. 119.

PARKE, B.—Was there a similar clause as to mistakes in that Act?

Francillon, for the defendant.—There is no other section of that act which would at all apply, except the 16th (*b*).

M'Lean.—An insolvent debtor who does not inquire as to the amount of the debts he owes, so as to insert them in his schedule correctly, is guilty of culpable negligence, if not of fraud and evil intention.

A clerk of the plaintiff was called, who proved that in the year 1837 he wrote circular letters to the defendant's creditors, with a view to the executing a deed of assignment, and that the plaintiff made a journey to Cheltenham on the business.

PARKE, B.—You have no evidence of anything beyond £10.

M'Lean.—The schedule admits the preparing of the deeds, and we have proved a journey and letters.

(*a*) 6 D. & R. 491.

(*b*) That section relates to the Insolvent Court inquiring into the truth of the schedule, but does not specifically relate to mistakes in describing debts.

PARKE, B.—The journey may be respecting the deeds. I consider that if a person puts in his schedule a debt for "drawing deeds," he is to be taken to mean, not merely the actual drawing of the deeds, but also stamps, journeys, taking instructions, and every thing else respecting them.

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Nonsuit.

M'Lean and *Greaves* for the plaintiff.

Thomas and *Francillon* for the defendant.

[Attornies—*Lambert* and *Lovegrove*.]

(*Crown Side.*)

BEFORE MR. JUSTICE WILLIAMS.

REGINA *v.* BOWEN.

MURDER.—The prisoner was indicted for the murder of Richard Yarworth, by shooting him with a pistol.

The prisoner had been committed for trial before the Spring assizes, 1840, on a charge of having shot Mr. Yarworth, and a true bill found; but the trial had been postponed to the present assizes, on the ground that Mr. Yarworth was too ill from his wounds to be able to attend the assizes. Since that time Mr. Yarworth had died. As soon as the prisoner had pleaded to the indictment for the murder, *W. J. Alexander*, for the prosecution, applied to postpone the trial till the next assizes, upon an affidavit, that Thomas Sharp, a material witness against the prisoner, upon the indictment for the murder of Mr. Yarworth,

Before the Spring Assizes, 1840, A. was committed to take his trial at those assizes for shooting B. The trial was postponed to the Summer Assizes, on the ground, that B. was too ill from his wounds to be able to attend to give evidence. Before the Summer Assizes B. died, and at those assizes a true bill for the murder of B.

was found against A., and application was made on the part of the prosecution to postpone the trial to the next Spring Assizes. on the ground of the illness of a material witness. The Judge granted the application, and held that A. was not intitled to his discharge under the 7th section of the Habeas Corpus Act.

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was too ill to attend these assizes without endangering his life.

Maclean, for the prisoner, urged the great hardship of postponing the trial till the next assizes, the prisoner's trial having been once previously postponed.

Greaves, on the same side.—This application is entirely novel and unprecedented, and no instance can be cited of a similar application having been granted, and I submit, that, in point of law, the trial cannot be postponed; but the trial *must* take place, or the prisoner be discharged. The question is one of great importance, and depends on the 7th section of the habeas corpus act, 31 Car. 2, c. 2, which enacts, "That if any person or persons shall be committed for high treason or felony, plainly and specially expressed in the warrant of commitment, upon his prayer or petition in open court the first week of the term, or first day of the sessions of oyer and terminer, or general gaol-delivery, to be brought to his trial, shall not be indicted some time in the next term, sessions of oyer and terminer, or general gaol-delivery, after such commitment; it shall and may be lawful to and for the judges of the Court of King's Bench and justices of oyer and terminer or general gaol-delivery, and they are hereby required, upon motion to them made in open court the last day of the term, sessions, or gaol-delivery, either by the prisoner or any one in his behalf, to set at liberty the prisoner upon bail, unless it appear to the judges and justices upon oath made, that the witnesses for the King could not be produced the same term, sessions, or general gaol-delivery; and if any person or persons committed as aforesaid, upon his prayer or petition in open court the first week of the term, or first day of the sessions of oyer and terminer and general gaol-delivery, to be brought to his trial, shall not be indicted and tried the second term, sessions of oyer and terminer or general gaol-delivery, after his commitment, or upon

his trial shall be acquitted, he shall be discharged from his imprisonment." Now this case would be precisely within the words of the act, if the prisoner had applied to be tried on the 1st day of the assizes, and his having omitted to do so can afford no reason for ousting him of the benefit of such a provision, which ought to be liberally construed in favour of personal liberty. In point of law the whole of the Assizes are considered as only one day, and any act done, or judgment given, at any period during the Assizes, is, in contemplation of law, the same as if it had taken place on the first day of the Assizes. A demand, therefore, to be tried, may well be held to be within the meaning of the statute, although made at a later period than the first day of the Assizes. Besides, it is the constant practice to do no criminal business on the first day of the Assizes, and prisoners are never brought into Court on that day, and have, therefore, on that day no opportunity of applying. Again, the commission may be opened so late in the day, (of which a remarkable instance occurred in this very Court), that there may be no time to make any application at all. Again, if the prisoner here be not entitled to the benefit of the clause, he can never hereafter claim its advantage, for the clause applies only to the second Assizes. Besides, in this case, the prosecutors have so acted, as to lead him necessarily to conclude that they would try the case at these Assizes. I submit, therefore, that the case is to be looked at as if the application had been made on the first day of the Assizes. Then, if that be so, I submit that the prisoner is entitled now either to be tried, or to be discharged. The power of postponing the trial on the absence of the witnesses for the Crown, is clearly limited by the earlier part of the section to the first Assizes after the commitment; and it is clear, that at the second Assizes the trial must take place, or the prisoner be discharged; for the case of a prisoner, tried and acquitted, and of a prisoner not tried, are put in the same position; and, as in the

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former case it is obvious the prisoner must be discharged, so it is in the latter. There are also the strongest reasons for so construing the act. The witnesses on the part of the Crown having been examined in the presence of the prisoner, their depositions, in case of their death, are evidence against the prisoner; but in case any of his witnesses die, or are absent, he will wholly lose the benefit of their testimony; and in this very case, the life of the prisoner may be sacrificed by postponing the trial, as his funds are wholly exhausted by twice bringing witnesses from Worcester to Gloucester (*a*). Besides the additional delay must necessarily prejudice the case of the prisoner, which is an alibi, as facts which are now fresh in the minds of the witnesses will become more indistinct the longer the trial is postponed. At all events, if the statute be not strictly applicable, no better authority can be found for guiding the discretion of the Court in postponing the trial.

WILLIAMS, J.—I am bound to postpone this trial. Who can prevent such an occurrence as this? I have as great a respect as any man for the habeas corpus act; but it is a human law, and must be humanly interpreted. The proviso is, that the prisoners should be indicted and tried at the second assizes: now he is indicted, but his trial must be subject to human contingency (*a*).

Trial postponed.

W. J. Alexander and *Skinner*, for the prosecution.

M'Lean and *Greaves*, for the prisoner.

[Attornies—*Harmer* and *Okey*.]

(*a*) The prisoner had been discharged by the magistrates at Cheltenham when first apprehended, upon proof of an alibi by witnesses from Worcester, and had afterwards been committed by other magistrates. The same witnesses, who had attended at Cheltenham, had attended at both the assizes at Gloucester.

(*b*) See the case of *Reg.* v. *Chapman*, ante, Vol. 8, p. 558.

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REGINA *v.* MEEK.

PERJURY.—The indictment charged the defendant with having committed perjury on the trial of a person named Burraston, on an indictment for perjury. In the present indictment it was stated that Burraston was convicted.

It appeared that Burraston was tried before Mr. Justice *Williams*, at the Gloucester Summer Assizes, 1839, and convicted, and that judgment of twelve months' imprisonment was given against him; but that that judgment was, in Easter Term, 1840, reversed in the Court of Queen's Bench on writ of error.

W. J. Alexander and *Gray*, for the defendant.—This prosecution must fail. The evidence of the defendant never could have been material, as the indictment against Burraston was held bad on writ of error. In the case of *Mullett* v. *Hunt* (*a*) which was an action on the case against a witness for disobeying a subpœna, Lord *Lyndhurst*, C. B., said, "No evidence could be material in the cause, unless the plaintiff had a good cause of action," and Baron *Bayley* says, "The first objection in this case is, that it is not averred, in this declaration, that the plaintiff had a good cause of action in the action brought by him in the King's Bench, [the case in which the defendant had been subpœnaed,] I agree that it is essential that such fact should appear on the declaration" (*b*). There is also another objec-

A. was indicted for perjury, alledged to have been committed on the trial of B. for perjury. The indictment against A. averred that the evidence he gave on the trial of B. was material, and that B. was convicted. It appeared that B. was convicted and sentenced, but that the judgment against B. was afterwards reversed on writ of error:—*Held*, that the reversal of the judgment against B. was no ground of defence for A., as showing that his evidence could not have been material, and that it did not negative the allegation, that B. had been convicted.

(*a*) 1 C. & M. 752.

(*b*) In the case of *Davis* v. *Lovell*, 4 M. & W. 678, (which was also an action against a witness for not obeying a subpœna); *Parke*, B., said, "The next objection is, that there is no averment that the plaintiff had a good cause of action in the original suit. It is not necessary in the present case directly to decide, whether such an averment is material or not; possibly as the attendance of a witness, in obedience to a subpœna, is a duty cast upon him by law, the service of the subpœna may of itself impose upon the witness the duty of obedience. If, on the other hand, it be not sufficient for the party to have brought an action, but he must moreover

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tion, which is, that the allegation in the indictment, that Burraston was convicted, is negatived; as that conviction was reversed on writ of error.

WILLIAMS, J.—I do not think there is anything in either of the objections. It would be rather too much to say, that whether a witness had committed wilful and corrupt perjury or not, could depend on the validity in point of form of the indictment as to which he gave evidence. I think also that the other allegation is satisfied by the proof.

The defendant was acquitted on the merits.

Greaves and *Talbot*, for the prosecution.

W. J. Alexander and *Gray*, for the defendant.

[Attornies—*G. L. Whatley* and *Stiles*.]

have had good cause of action for bringing it, as appears to be the opinion of Lord Lyndhurst and Bayley, B., in *Mullett* v. *Hunt*; still the averments in the declaration are such as would on the authority of that case impose upon the plaintiff proof of the existence of such good cause of action."

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READING ASSIZES, 1840.

(*Civil Side.*)

BEFORE MR. JUSTICE PATTESON.

READ *v.* THOYTS, Esq. (*a*).

In an action against a sheriff for removing goods taken under a fi. fa. without paying a year's rent, which was due to the landlord, the tenant against whom the execution issued is a competent witness for the plaintiff.

In such an action the defendant pleaded that no rent was in arrear, and that the sheriff had no notice that any rent was in arrear, thus admitting the execution and the taking by the defendant. It was proved that the goods were actually taken by M., and had never been taken except on that occasion:—*Held*, that as there had been no other seizure, this sufficiently showed M. to have acted by the authority of the defendant, without proof of any warrant.

CASE.—The first count of the declaration stated that on the 12th day of June, 1839, and for a year then last past, one Taylor had occupied a certain messuage, as tenant to the plaintiff, at a certain rent; and that on that day the sum of £10, for and on account of the rent so payable by Taylor to the plaintiff for the same, for one year of the said tenancy, ending at and upon that day, became due and remained in arrear and unpaid; and that on the 18th day of June, 1839, the defendant, being sheriff of Berkshire, by virtue of a writ of fieri facias, issued on the suit of Charles James Barnes, took in execution the goods and chattels of Taylor, then being in the said messuage so being in his occupation as aforesaid; and that though the defendant had notice that the said year's rent

In such an action there was, in addition to the special count, a count in trover to which the defendant pleaded not guilty, and that the plaintiff was not possessed; and the plaintiff, in addition to the proof that a year's rent was due, gave in evidence an absolute bill of sale by which the tenant, before any rent had become due, assigned all his goods (including those taken in the fi. fa.) to the plaintiff for a debt, the tenant remaining in possession of the goods:—*Held*, that there being no evidence on the latter count to connect the sheriff with the taking of the goods, the plaintiff must fail on that count; but that if the jury thought the bill of sale void, as against the execution creditor, they might find for the plaintiff on the first count for the amount of the year's rent; and the jury having found for the plaintiff on the first count, and for the defendant on the second count, the Judge would not certify under the stat. 4 Anne, c. 16, s 5., to exempt the defendant from costs on the pleas pleaded by him to the first count of the declaration.

(*a*) This case was omitted in its proper order.

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was in arrear to the plaintiff as aforesaid, the defendant removed the said goods out of the said messuage, without paying the said rent to the plaintiff; and the count went on to aver that the rent was still unpaid, and that the plaintiff had lost the benefit of a distress; 2nd, a count in trover for all the goods which were taken.—Pleas, 1st, to the whole declaration, not guilty; 2nd, to the first count, that the plaintiff gave no notice to the defendant that the rent was in arrear; 3rd, to the first count, that the rent was not due as therein alleged; 4th, to the second count, that the plaintiff was not possessed of the goods as of his own property.

On the part of the plaintiff, Taylor was called.

Ludlow, Serjt., and *Tyrwhitt*, for the defendant, objected that he was not a competent witness, on the ground, that, if the plaintiff obtained a verdict, Taylor would get rid of the plaintiff's claim on him for rent. They cited the case of *Thurgood* v. *Richardson* (*a*).

PATTESON, J.—That case is very different from the present. I think that as the record states the issuing of the fieri facias at the suit of Mr. Barnes, it shews that money was due to him from Taylor, who would remain liable for that, although the plaintiff should obtain a verdict in this action against the sheriff.

The witness Taylor was, however, released by the plaintiff, and he stated, that on the 18th of June, 1839, a person named M'Graw took away the goods which were in his (Taylor's) possession, in the house which he rented of

(*a*) 5 M. & P. 266. In that case, which was an action by a landlord against a sheriff for removing, under an execution, the goods of his tenant, without reserving a year's rent, as required by the stat. 8 Anne, c. 14, the tenant was called as a witness to prove the rent due, and on his being objected to on the ground of interest, the landlord gave him a general release, and it was held that the landlord was not thereby precluded from recovering against the sheriff the amount of rent; as it was the misconduct of the sheriff in not reserving the rent, which made the release necessary.

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the plaintiff, after M'Graw had been told by the witness that the goods were not his, but the plaintiff's, under a bill of sale. This witness also stated, that a sum of 10*l.* was due to the plaintiff for rent, and that the goods were only seized under this one execution.

Ludlow, Serjt., and *Tyrwhitt*, for the defendant, objected, that even if the defendant was estopped by the pleadings from denying that he, as sheriff, had taken the goods of Taylor at the suit of Mr. Barnes, yet it was neither admitted nor shewn that M'Graw was the person who so took them by the authority of the defendant, so that there was nothing even in the notice of Taylor to M'Graw, or in any declaration of M'Graw, to shew any connexion between him and the defendant, who had denied all wrongful seizure by his plea of not guilty.

PATTESON, J.—I think that this objection is not well founded. As the execution at the suit of Mr. Barnes is admitted on the pleadings, and no other execution appears, M'Graw must be taken to have seized the goods for Taylor's debt due to Mr. Barnes, and I think that M'Graw is therefore sufficiently shewn to have acted under the sheriff without further evidence. This point was a good deal considered in the case of *Barsham* v. *Bullock, Esq.* (*a*).

It was further proved by the witness Taylor, that he became tenant of the plaintiff, and entered on the house, (which was used as a beer-shop), on the 12th of June, 1838, and not on the 24th of June in that year,

(*a*) 2 P. & D. 241. That was an action of debt for a penalty against the sheriff for taking the plaintiff, who had been arrested by the defendant, to a public drinking-house without the plaintiff's consent; the plea traversed the taking of the plaintiff to the drinking-house without his consent. Evidence was given at the trial, that the same officer of the defendant, who arrested the plaintiff, also took him to the drinking-house against his consent, and it was held that, as the plea admitted that the officer who arrested was the defendant's agent, and the evidence shewed that the same officer took the plaintiff to the drinking-house, it was not necessary to produce the warrant to make the defendant liable.

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and that on the 23rd of February, 1839; he owed the plaintiff £66 for beer, and gave him a bill of sale of all his effects as a security for this debt, but was suffered to remain in possession of the house and goods as before.

The bill of sale was put in. It was an absolute bill of sale to the plaintiff of all the goods and effects of Taylor. Notice had been given to the defendant to produce the writ of fieri facias; but it was not produced, nor was any evidence given of it. No notice had been given to produce any warrant, nor was M'Graw subpœnaed to produce it; and no evidence was given either of any warrant issued by the defendant to M'Graw, or even that M'Graw was a sheriff's officer. The goods seized were proved to be worth more than £10.

Ludlow, Serjt., for the defendant.—The second count, if sustained, is destructive of the first count, the gist of which is, that the plaintiff has been deprived by the defendant of the power of distraining on his tenant's goods for his year's rent, secured to him by the stat. 8 Anne, c. 14, s. 1 (*a*), whereas, in order to recover on the second count, the goods must all have belonged to the plaintiff under the bill of sale at the time they were seized. The plaintiff is bound by the bill of sale as he is a party to it, and as no rent was due at the time of the bill of sale (*b*), he cannot recover on the first count; and with

(*a*) In the case of *Hodgson and others*, assignees of *Seaton* v. *Gascoigne*, 5 B. & A. 88; where the growing crops of a tenant having been seized under a writ of fieri facias, a writ of habere facias possessionem was subsequently delivered to the sheriff in an ejectment at the suit of the landlord, founded on a demise made long before the issuing of the fieri facias; it was held, that the sheriff was not bound to sell the growing crops under the fieri facias, inasmuch as they could not, in point of law, be considered as belonging to the tenant, the latter being a trespasser from the day of the demise laid in the declaration; and it was also held, that the sheriff had no right to allow the landlord a year's rent under the stat. 8 Anne, c. 14, that statute contemplating an existing tenancy, which, in this case, must be taken to have ceased on the day of the demise in the ejectment.

(*b*) In the case of *Hoskins* v. *Knight*, 1 M. & S. 245, it was held, that the landlord of premises upon which the goods of his tenant are

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respect to the second count, the plaintiff clearly cannot recover upon that, as the only pleas to that count deny the plaintiff's property in the goods, and also the taking; and upon the issues on those pleas the plaintiff has given no evidence to connect the sheriff with the actual taking of the goods. The only thing to connect him with the taking being an admission made with respect to other issues, which are applicable in the first count of the declaration only.

PATTESON, J., (in summing up).—The plaintiff has, in this case, adopted two inconsistent statements of his claim; but he will, notwithstanding that, be entitled to succeed upon either if it be established. It appears, that, on the 23rd of February, 1839, no rent being then due to him, he received from Taylor a bill of sale of all Taylor's goods as a security for a debt for beer; but after the seizure at the suit of Mr. Barnes, he seems to have thought the continued possession of the goods by Taylor down to that event on the 18th of June, might affect the validity of the bill of sale, and he then puts in a claim as landlord for his rent, treating the goods as Taylor's still. Taking the case on the second count, and taking the goods to be the plaintiff's on the bill of sale, there is no evidence to shew that any writ was sent to the defendant at the suit of Mr. Barnes, or that he ever gave a warrant to M'Graw; and as there is no evidence to connect M'Graw with the defendant, the plaintiff must fail as to that count. With respect to the first count, the plaintiff is entitled to a verdict for the amount of the rent due, if you are satisfied that the goods, at the time of the seizure, belonged to Taylor by reason of the bill of sale being void, as being a fraudulent bill of sale, as against the execution creditor; this not being one of the many cases where the continued possession by the vendee is consistent with the terms of the bill

taken in execution, can only claim from the party suing the execution, the rent due at the time of taking the goods, and not that which accrues after the taking and during the continuance of the sheriff in possession.

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of sale. [His Lordship left it to the jury to say whether the year's rent was due to the plaintiff, and whether the bill of sale was fraudulent, and therefore void.]

Verdict for the plaintiff on the first count of the declaration, with £10 damages—the jury finding the bill of sale to be fraudulent; and verdict for the defendant on the second count.

F. V. Lee, and *Beadon*, for the plaintiff.

Ludlow, Serjt., and *Tyrwhitt*, for the defendant.

[Attornies—*G. Hyde*, and *Blandy*.]

Tyrwhitt afterwards applied to the learned Judge to certify under the stat. 4 Anne, c. 16, s. 5, that the defendant had probable cause for pleading his pleas to the first count, as the goods mentioned in both counts were really the same. He cited the case of *Robinson* v. *Messenger* (*a*).

PATTESON, J., after taking time to consider, refused the application (*b*).

In the ensuing term *Ludlow*, Serjt., applied to the Court of Exchequer for a new trial, but the Court refused a rule.

(*a*) 3 N. & P. 583. In that case it was held, that the rule of H. T. 4 Will. 4, No. 7, has not repealed the stat. 4 Anne, c. 16, s. 5, as to the Judge's power to certify, so as to exempt the defendant from the costs of an issue found against him, where he has pleaded several matters; and that where, to an action of assumpsit on the warranty of a horse, the defendant pleaded, first, non assumpsit, and secondly, that the horse was sound, and a verdict having been found for the defendant for the first plea, and against him on the second, the Judge who tried the cause certified that he had probable cause for pleading the second plea, the defendant was held to be exempted by the statute from paying any costs in respect of it.

(*b*) This certificate, if granted, would have exempted the defendant from the costs of the issues to which it applied.

CENTRAL CRIMINAL COURT.

JULY SESSION, 1840.

BEFORE MR. JUSTICE PATTESON.

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July 8th.

REGINA *v.* JAMES ALLEN.

A prisoner was convicted on an indictment for a rape, which charged that the prisoner, "in and upon E. F.," "feloniously and violently did make [omitting the words 'an assault,'] and her, the said E. F., then and there, and against her will, violently and feloniously did ravish and carnally know; against the form of the statute, &c,—*Held*, that the omission of the words "an assault," was no ground for arresting the judgment.

THE prisoner was indicted for a rape on Ellen Fitzgerald. The indictment was in the following form:—"Central Criminal Court, to wit.—The jurors for our lady the Queen, upon their oaths present, that James Allen, late of the parish of Hornsey, in the county of Middlesex, and within the jurisdiction of the said Court, labourer, on the 1st day of July, 4 Vict., with force and arms, at the parish aforesaid, and within the jurisdiction of the said Court, in and upon Ellen Fitzgerald, in the peace of God and our said lady the Queen then and there being, violently and feloniously did make (*a*), and her, the said Ellen Fitzgerald, then and there and against her will violently and feloniously did ravish and carnally know, against the form of the statute in such case made and provided, and against the peace of our said lady the Queen, her crown and dignity."

After the Jury had been charged with the prisoner,

PATTESON, J., discovered the omission of the words "an assault;" but his Lordship allowed the case to proceed, and the Jury found the prisoner

Guilty.

(*a*) The words "an assault" were omitted.

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His Lordship respited the judgment, in order that it might be considered by the fifteen Judges, whether the judgment ought to be arrested, because of the omission of the words "an assault."

In Michaelmas Term, 1840, the case was considered by the Judges; and ten were of opinion that the judgment ought not to be arrested; and at the November Sessions the prisoner had judgment of death recorded against him (*a*).

(*a*) The stat. West. 1, (3 Edw. 1.) c. 13, has the words—"The King prohibiteth that none do *ravish* any woman against her will," and inflicts two years' imprisonment and fine: and by the stat. of West. 2, (13 Edw. 1.), c. 34, "it is provided, that if a man from henceforth do ravish a woman, married, maid, or other, where she did not consent, neither before nor after, he shall have judgment of life and of member." The stat. 18 Eliz. c. 7, made it felony, without benefit of clergy, "to commit or do any manner of felonious rape, ravishment, or burglary." By sect. 1 of the stat. 9 Geo. 4, c. 31, all these enactments are repealed; and by sect. 16 of that statute it is enacted, "that every person convicted of the crime of rape shall suffer death as a felon." The crime of rape was a felony at common law, the punishment having been varied by statute as already mentioned. By the stat. 7 Geo. 4, c. 64, s. 21, it is enacted, "that where the offence charged has been created by any statute, or subjected to a greater degree of punishment, or excluded the benefit of clergy, by any statute, the indictment or information shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute." Lord *Hale* says—(1 H. P. C. 632), "the indictment [for a rape] ought to have these three ingredients, 1st, it must be felonice; 2nd, it must be rapuit et carnaliter cognovit; 3rd, it must conclude contra formam statuti." But in 2 Curw. Hawk. 249, it is said, "that in an appeal of rape the fact seems to be sufficiently declared, by shewing that the defendant felonice rapuit the woman, without adding the words carnaliter cognovit, or any others tantamount." In the case of *Rex* v. *Pelfryman*, 2 Leach, 641, it was held, that the omission of the word "feloniously" before the word "did make an assault," is fatal to an indictment for robbery.

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BEFORE MR. SERJEANT ARABIN.

REGINA *v.* RICHARD LEWIS.

July 9th.

An indictment on the 7 W. 4, & 1 Vict. c. 85, ss. 3 & 4, charged the prisoner with *attempting to discharge* at the prosecutor a certain blunderbuss, loaded with gunpowder and divers leaden shots. It appeared that the prisoner, on a refusal by the prosecutor to give him up some title-deeds, addressed him in these words: "Then you are a dead man," and immediately unfolded a great coat which he had on his arm, and took out a blunderbuss, but was not able to raise it to his shoulder, or point it directly at the prosecutor, before he was seized. The blunderbuss was found to be very heavily loaded, but the flint had dropped out, and was discovered between the lining of the great coat. —*Held*, that the evidence was not sufficient to sustain the charge in the indictment.

THE indictment, in the first count stated, that the prisoner, on the 3rd of July, in and upon Henry Evans did make an assault, and feloniously did attempt to discharge at and against him a certain blunderbuss, loaded with gunpowder and divers leaden shots, with intent feloniously, wilfully, and of his malice aforethought, to kill and murder him (*a*). The second count charged the intent to be to maim and disable.

From the evidence for the prosecution, it appeared that the prisoner, who was the brother-in-law of the prosecutor, went to his house about six o'clock in the evening of the 3rd of July, and asked him for some title-deeds which he held as a security. The prisoner said he wanted them. The prosecutor told him it was no use making any words about them, as he could not let him have them till he saw

(*a*) The stat. 7 W. 4 & 1 Vict. c. 85, s. 3, enacts, inter alia, that whosoever shall, by drawing a trigger, or in any other manner attempt to discharge any kind of loaded arms at any person with intent to murder, shall be guilty of felony, and be liable to be transported for life, or for not less than fifteen years, or imprisoned for any term not exceeding three years.

In the case of *Rex* v. *Carr*, Russ. & Ry. 377, which was an indictment on the 43 Geo. 3, c. 58, for attempting to discharge a loaded blunderbuss with intent to murder, the jury found the prisoner guilty, but added, that the blunderbuss was not primed at the time when he drew the trigger. A majority of the Judges considered the verdict of the jury as equivalent to a finding by them that the blunderbuss was not so loaded as to be capable of doing mischief by having the trigger drawn: and therefore, in point of law, it was not loaded within the meaning of the statute. See the case of *Reg.* v. *St. George*, ante, p. 483.

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himself righted for the two bills that he was liable for. The prisoner upon this rose up and said, "Then you are a dead man," and unfolded a great coat which he had on his arm, and took out a blunderbuss. The prosecutor's account of the remainder of the transaction was given in his evidence as follows:—"I saw him take it from the coat; he could not get it out readily; there was some little difficulty; he held it with both his hands; he was on the opposite side of the room to where I was; the muzzle of the blunderbuss was towards the side of the room where I was, but it was not pointed at me; it was not up to his shoulder; it was as low as a person could hold it; a person who was near him seized him by the two arms, and I rose from my chair, seized him by the collar. and threw him down on the sofa; he was secured. The blunderbuss was never pointed towards me; whatever the prisoner's intention was, it was prevented by Hazlehurst laying hold of him; I cannot say whether the blunderbuss was thrown down or not; Mrs. Evans took it, but whether from the prisoner's hand or not, I cannot say."

The witness Hazlehurst stated, that, before the blunderbuss was pointed at the prosecutor, he seized the prisoner, and prevented his doing anything.

The policeman stated that the blunderbuss was primed and very heavily loaded, but that there was not any flint in it; and a flint, which evidently belonged to it, was found between the lining in the coat from beneath which the prisoner took the blunderbuss.

On the part of the prisoner, it was contended that the charge in the indictment of an attempt to discharge the blunderbuss, was not made out, but rather disproved by the evidence.

ARABIN, Serjt., after consulting with PATTESON, J., told the jury that they were both of opinion, that, to sustain the indictment, there must be something more than the mere presenting of the blunderbuss, and that some act must be

shewn to have been done by the prisoner, to satisfy the jury that he did, in fact, attempt to discharge the blunderbuss.

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Verdict—Not Guilty.

C. Phillips, for the prisoner.

BEFORE LORD DENMAN, C. J., MR. BARON ALDERSON, AND MR. JUSTICE PATTESON.

REGINA *v.* EDWARD OXFORD.

July 9th.

If in an indictment for treason, it be stated as an overt act that the prisoner discharged at the Sovereign a pistol *loaded with powder and a certain bullet*, and thereby made a direct attempt on the life of the Sovereign: the jury must be satisfied that the pistol was a loaded pistol: that is, that there was something in it beyond the powder and wadding; but it seems it is not necessary for them to be satisfied that it was actually loaded with that which is generally known by the name of a bullet.

If to such a charge the defence set up be insanity, the question for the jury will be whether the prisoner was labouring under that species of insanity which satisfies them that he was quite unaware of the nature, character, and consequences of the act he was committing: or in other words, whether he was under the influence of a diseased mind, and was really unconscious at the time he was committing the act that it was a crime.

If the jury in such a case are of opinion that the prisoner did not in fact do all that the law deems essential to constitute the offence charged, they must find him not guilty generally; and the Court have no power to order his detention under the 39 & 40 Geo. 3, c. 94, s. 2, although the jury should be clearly of opinion that the prisoner was in fact insane, such a state of circumstances appearing to be casus omissus in the act.

THE indictment stated in substance that the prisoner being a subject of our Lady the Queen, on the 10th of June, as a false traitor, maliciously and traitorously did compass, imagine, and intend to bring and put our said Lady the Queen to death; and to fulfil, perfect, and bring to effect his treason and treasonable compassing and imagination, he, as such false traitor, maliciously and traitorously did shoot off and discharge a certain pistol loaded with gunpowder and a certain bullet, which pistol he held in one of his hands, at the person of our said Lady the Queen, with intent thereby and therewith maliciously and traitorously to shoot, assassinate, kill, and put to death our said Lady the Queen, and thereby traitorously made a direct attempt against the life of our said Lady the Queen. And further, to fulfil and bring to effect his treason and treasonable compassing, &c. aforesaid, he, as such false

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traitor, on the 10th of June, maliciously and traitorously did shoot off and discharge a certain other pistol loaded with gunpowder and a certain bullet, which he held in one of his hands, at the person of our said Lady the Queen, with intent thereby maliciously and traitorously to shoot, assassinate, kill, and put to death our said Lady the Queen, and thereby traitorously made a direct attempt against the life of our said Lady the Queen; against the duty of his allegiance and against the statute, &c. — The prisoner pleaded Not Guilty (*a*).

Campbell, A. G., for the Crown.—By the stat. 25, Edw. 3, c. 2, which regulates the law of high treason, it is enacted that when a man doth compass or imagine the death of his Majesty, and thereof be probably attainted of open deed by men of his condition, it shall be judged treason. The statute speaks of the offence and an overt act. The offence charged is the compassing and imagining the death of the Sovereign, and the charge is to be made out by the act that was done. The act of Parliament 39 & 40 Geo. 3, c. 93 (*b*), was intended to give the life of the Sovereign the same protection that is given to the meanest subject in the land. For, before the passing

(*a*) The prisoner had pleaded at the last session; but his trial having been postponed to the present session, he was called upon to plead de novo.

(*b*) The statute provides that in all cases of high treason, in compassing and imagining the death of his Majesty, and misprision of such treason, where the overt act or acts thereof alleged in the indictment for such offence shall be assassination and killing of his Majesty, or *any direct attempt against his life* or against his person, whereby his life may be endangered, or his person suffer bodily harm, the persons charged therewith may be indicted, arraigned, tried, and attainted in the same manner and course of trial, and upon like evidence, as if such person stood charged with murder; and none of the provisions of the 7 & 8 W. 3, c. 3, or 7 Anne, c. 21, [for which see *R.* v. *Frost*, ante, p. 129], touching trials in cases of treason, shall extend to any indictment for high treason or misprision of treason, where the overt act alleged therein is as aforesaid, but on conviction, judgment and execution shall be done as in cases of high treason.

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of that statute, even where the death of the Sovereign was occasioned, there were required many formalities which were very proper in cases of rebellion or other political treason. There will be two questions in this case:—first, Whether supposing the prisoner to be accountable for his actions, he, in point of fact, committed the offence imputed; and secondly, Whether at the time he committed the act, he was accountable for his actions. The burthen of proof with respect to the first rests wholly on the prosecution; the other is to be proved by the prisoner. It will appear from the evidence, that he had deliberately formed a plan to make an attempt on the life of the Sovereign. In the early part of May he bought a pair of pistols and a powder flask, and practised shooting at several shooting galleries. On the 3rd of June he bought some copper caps, inquired where he could buy bullets, and said he had some gunpowder. On the evening of the 9th of June he was in possession of a pistol, and said that it was loaded. He was asked what he meant to do with it, and refused to tell, but said he had been firing at a target. On Wednesday, the 10th of June, about six o'clock in the evening, the Queen and Prince Albert left the palace in a low open carriage, drawn by four horses, with two outriders before, and no other attendants. The Queen sat upon the left side, and Prince Albert on the right; they drove up Constitution Hill, and about a third of the way between the palace and the triumphal arch was the prisoner, watching their approach: he was walking backward and forward with his hands under the lappels of his coat; he was on the right hand side, and as the carriage approached he turned round and nodded, and discharged a pistol; *the ball was heard to whiz by on the opposite side.* The carriage went on; he then looked back and aimed another pistol at her Majesty; the Queen stooped on seeing him; *the ball from this pistol was heard to whiz on the opposite side*; the Queen then drove to the residence of the Duchess of Kent; there were a number of persons on

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the left hand, between the road and the gardens of Buckingham Palace; another man was at first seized and accused by mistake, when the prisoner said "It was me, I did it, I surrender myself." He was taken to the station-house, and when there he asked whether the Queen was hurt, and after being told she was not, *he was asked if there were not bullets in the pistols, and he admitted that there were;* his lodgings were searched, and in his box was found a sword and scabbard, two pistol bags, a bullet-mould, a black crape, a razor, a powder-flask containing about three ounces of powder, *five leaden bullets,* and fourteen percussion caps; there was also a pocket-book containing various papers; he said he had intended to destroy the papers in the morning before he went out; the first paper was without a date; it was headed "Young England," &c.; the contents were as follow:—"Rules and Regulations. 1. That every member shall be provided with a brace of pistols, a sword, rifle, and a dagger; the two latter to be kept at the committee-room. 2. That every member must, on entering, take the oath of allegiance, to be true to the cause he has joined. 3. That every member must, on entering the house, give a signal to the sentry. 4. That every officer shall have a factitious name; his right name and address to be kept with the secretary. 5. That every member shall, when he is ordered to meet, be armed with a brace of pistols (loaded), and a sword to repel any attack, and also be provided with a black crape cap to cover his face, with his marks of distinction outside. 6. That whenever any member wishes to introduce any new member, he must give satisfactory accounts of him to the superiors, and from thence to the council. 7. Any member who can procure 100 men shall be promoted to the rank of captain. 8. Any member holding communications with any country agents must instantly forward the intelligence to the secretary. 9. That whenever any member is ordered down the country, or abroad, he must take various disguises with him, as the la-

bourer, the mechanic, and the gentleman; all of which he can obtain at the committee-room. 10. That any member wishing to absent himself for more than one month, must obtain leave from the commander-in-chief. 11. That no member will be allowed to speak during any debate, nor allowed to ask more than two questions. All the printed rules kept at the committee-room.—List of principal members—Factitious names—*President :* Gowrie. *Council :* Justinian, Ernest, Alowan, Augustia, Coloman, Ethelred, Kenneth, Ferdinand, Godfrey, Nicholas, Hanibal, Gregory. *Generals :* Fredeni, Otho, Augustus, Anthony. *Captains :* Oxonian, Louis, Mildon, Amadeus. *Lieutenants:* Hercules, Mars, Neptune, Albert. Marks of distinction: *Council,* a large white cockade. *President,* a black bow. *General,* three red bows. *Captain,* two red bows. *Lieutenant,* one red bow. A. W. Smith, Secretary."—The first of the letters found in the pocket-book was dated May 16, 1839, and addressed "Mr. Oxford, at Mr. Minton's, High-street, Marylebone." It was in these words, "Young England.—Sir,—Our commander-in-chief was very glad to find that you answered his questions in such a straightforward manner. You will be wanted to attend on the 21st of this month, as we expect one of the country agents to town on business of importance. Be sure and attend. A. W. Smith, Secretary.—P. S. You must not take any notice to the boy, nor ask him any questions." The second letter was dated Nov. 14, 1839, and addressed "Mr. Oxford, at Mr. Parr's, Hat and Feathers, Goswell-street." It was in these words, "Young England—Sir, I am very glad to hear that you improve so much in your speeches. Your speech the last time you were here was beautiful. There was another one introduced last night, by Lieutenant Mars, a fine, tall, gentlemanly looking fellow, and it is said that he is a military officer; but his name has not yet transpired. Soon after he was introduced, we were alarmed by a violent knocking at the door. In an instant our faces were covered, we cocked our pistols, and with

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drawn swords stood waiting to receive the enemy. While one stood over the fire with the papers, another stood with lighted torch to fire the house. We then sent the old woman to open the door, and it proved to be some little boys who knocked at the door and ran away. You must attend on Wednesday next. A. W. Smith, Secretary." The last of the letters was dated April 3rd, 1840, and addressed "Mr. Oxford, at Mr. Robinson's, Hog in the Pound, Oxford-street." It was as follows: "Young England—Sir,—You are requested to attend to night, as there is an extraordinary meeting to be holden, in consequence of having received some communications of an important nature from Hanover. You must attend; and if your master will not give you leave, you must come in defiance of him. A. W. Smith, Secretary."

Under these circumstances, if the prisoner was acountable for his actions, it will be for you to say whether you can entertain any reasonable doubt of his guilt. I must inform you, that the balls have not been found; but I apprehend nobody can doubt that the pistols were loaded. I do not attach much weight to the mark on the wall, but rather suppose that the balls must have gone over the wall into the garden. Then will come the second question, whether the prisoner was insane at the time he did the act—whether he was unconscious of what he was doing, so that he did not know right from wrong. If he was labouring under some delusion, and did not know the consequence of what he was doing—if he was insane at the time, then he is not an accountable agent. It is said the law of England, in ancient times, was, that insanity was not a defence to a charge of attempting the life of the Sovereign; and an act passed in the reign of King Henry the Eighth, seems to countenance that view of the subject (*a*);

(*a*) In Coke's 3rd Institute, p. 6, it is said, "It was further provided by the said act of 33 H. 8, that if a man attainted of treason became mad, that, notwithstanding, he should be executed, which cruel and inhuman law lived not long, but was repealed."

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but that act is wholly repealed. Still, however, in order to excuse the prisoner, it must be shewn, not only that at times there was eccentricity displayed or violence committed by him, but they must shew that, at the time, he was unconscious that he was committing an offence. It would be very dangerous if some degree of weakness of intellect, some degree of eccentricity, and even violence at *other* times, should prevail as a defence, if the prisoner was not in a state of insanity at the time when the offence was committed. There must, by the law of England, be proof of a greater aberration of mind in criminal than in civil cases. In criminal cases, the evidence of insanity must be connected with the particular act. I will call your attention to the authorities—Lord Coke says (*a*), "He that is not compos mentis, and totally deprived of all compassings and imaginations, cannot commit high treason by compassing and imagining the death of the King; for furiosus solo furore punitur: but it must be *an absolute madness and a total deprivation of memory*." But his words are not to be literally taken, but with great latitude, as total absence of memory is not to be found even in a furious maniac. But though I mention this, I rely on Lord Hale's opinion. He says (*b*), "There is first a partial insanity of mind; and second, a total insanity. The former is either in respect to things, quoad hoc vel illud insanire; some persons that have a competent use of reason in respect of some subjects, are yet under a particular dementia in respect of some particular discourses, subjects, or applications, or else it is partial in respect of degrees; and this is the condition of very many, especially melancholy persons, who, for the most part, discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason: and this partial insanity seems not to excuse them in the committing of any offence for its matter capital; for, doubtless, most persons that are

(*a*) 3rd Institute, p. 6.
(*b*) 1 Pleas of Crown, p. 30, chap. 4, s. 2.

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felons of themselves and others, are under any degree of partial insanity when they commit the offences: it is very difficult to define the indivisible line that divides perfect and partial insanity; but it must rest on circumstances duly to be weighed and considered both by the judge and jury." In Alison's Principles of the Criminal Law of Scotland (*a*), (and there is no difference between the law of England and the law of Scotland with reference to insanity), it is said, "to amount to a complete bar of punishment, either at the time of committing the offence, or of the trial, the insanity must have been of such a kind as entirely to deprive the prisoner of the use of reason, *as applied to the act in question*, and the knowledge that he was doing wrong in committing it. If, though somewhat deranged, he is yet able to distinguish right from wrong, *in his own case*, and to know that he was doing wrong in the act which he committed, he is liable to the full punishment of his criminal acts." In *Arnold's case* (*b*), Mr. Justice Tracey observed "that the defence of insanity must be clearly made out; that it is not every idle or frantic humour of a man, or something unaccountable in his actions, which will shew him to be such a madman as to exempt him from punishment."— In *Lord Ferrers's case* (*c*) the prisoner was unanimously found guilty by the House of Peers, though many witnesses stated, that they considered him insane, and it appeared that several of his relations had been confined as lunatics; it being contended on the part of the prosecution, that the complete possession of reason was not necessary, in order to render a man responsible for his acts; it was sufficient if he could discriminate between good and evil. In *Bowler's case* (*d*), Mr. Justice Le Blanc told the jury that it was for them to determine "Whether the prisoner, when he committed the offence, was capable of distinguishing between right and wrong, or under the influence of any illusion in

(*a*) P. 654.

(*b*) 16 How. St. Tr. 764, 765; and Collinson on Lunacy, p. 475.

(*c*) 19 How.St. Tr. 886.

(*d*) Collinson on Lunacy, 673 (*n*).

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respect to the prosecutor, which rendered his mind at the moment insensible of the nature of the act which he was about to commit; since in that case he would not be legally responsible for his conduct. On the other hand, provided they should be of opinion that, when he committed the offence, he was capable of distinguishing right from wrong, and not under the influence of such an illusion as disabled him from discovering that he was doing a wrong act, he would be answerable to the justice of the country, and guilty in the eye of the law." In that case Mr. Warburton, the keeper of a lunatic asylum, said he had no doubt of the prisoner's insanity, and a commission of lunacy was produced, dated the 17th June, 1812, with a finding that the prisoner had been insane from the 30th of March. When the offence was committed does not appear from the report. The jury, after considerable deliberation, pronounced the prisoner guilty.

ALDERSON, B.—Bowler was executed, I believe; and very barbarous it was.

Campbell, A. G.—I will not refer to *Bellingham's case*, as there are some doubts as to the correctness of the mode in which that case was conducted; but I will refer to *Hadfield's case* (*a*). In that case the learned Judge who tried the prisoner, said that "as the prisoner was deranged immediately before the offence was committed, it was improbable that he had recovered his senses in the interim: and although, were they to run into nicety, proof might be demanded of his insanity at the precise moment when the act was committed; yet there being no reason for believing the prisoner to have been at that period a rational and accountable being, he ought to be acquitted. And the Attorney-General of that day, (as I hope the party representing the Crown at any time would do), immediately yielded to

(*a*) Collinson on Lunacy, 480, and 1 Russ. 11.

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the opinion of the Judge, and the jury at once acquitted the prisoner. But in that case there were very extraordinary circumstances. The law, as stated by Mr. Erskine who conducted the defence, and which was approved by the Court, and has been acted on ever since, is, that the prisoner "must appear to the jury to be non compos mentis, in the legal acceptation of the term; and that, not at any *anterior period*, which can have no bearing upon any case whatever; but *at the moment* when the contract was entered into, or the crime committed (*a*)". Such being the law upon the subject, it will be for you to say, whether Edward Oxford was, at the time when he shot at her Majesty, in a state of insanity. I should have rejoiced if such a defence could have been made out; but, as far as I am yet aware, I know no reason for concluding that the prisoner, at the time he did the act, was in a state of mind to make him not responsible. He is not an idiot; on the contrary, he is rather of quick intellect. He has not received any wound. It is said it can be shewn that his father was insane: that would most likely be considered as evidence by their Lordships, and I should not object. The father's insanity will not excuse the son, unless they shew that the son was insane at the time when the act was done. The prisoner was never put under restraint by his friends as insane. Suppose he had entered into a contract on the morning of the day, or gone to vote at an election, would he have been held incompetent? At present I am not aware that he was at any time insane so as to have his acts avoided. Suppose a commission of lunacy were issued, or under an act of Parliament he was sent to confinement, would he not recover damages? suppose he was examined by commissioners of lunacy, and stated what he has stated with reference to this act, would it sustain the commission? Before the Privy Council he was asked if he had anything to say; and, having cross-examined the witnesses,

(*a*) 27 How. St. Tr. p. 1312.

he said, "A great many witnesses are against me: some say I shot with my left hand, others with my right; they vary as to the distance; after I fired the first pistol, the Prince got up as if he would jump out of the coach, and sat down again, as if he thought better of it; then I fired the second pistol: this is all I shall say at present." If as to all civil matters the prisoner was responsible, a fortiori, is he answerable in a criminal case.

The witnesses for the prosecution having substantially proved the case, according to the statement made in the *Attorney-General's* opening,

J. Sydney Taylor addressed the jury for the prisoner.—There is but one count in this indictment; but it alleges two overt acts. Hadfield, whose case has been referred to by the *Attorney-General,* was protected by those forms of the law which have since been taken away. The provision in the statutes of Ann & Will. was a wise provision, and was so styled by Mr. Erskine in that case. The case of attempting to murder the Sovereign is not parallel with the case of attempting to murder a subject. The case is prejudged by addresses to the Crown, and by thanksgivings in the churches. If you are not satisfied that the overt acts have been proved, you cannot convict the prisoner of the treason charged in the indictment. That the prisoner discharged the two pistols seems to be placed beyond all question; but if that was not done with the intention of taking away the Queen's life, it will not be enough. An intention to do her Majesty some grievous bodily harm would not be enough—it is not a direct attempt on the life of the Sovereign, and would be a species of treason entitled to the protection of the statutes. You must be satisfied that the pistols were pointed at the Queen, and that they were loaded with balls. There is no direct evidence that there were any balls. In the case of *Blake* v. *Barnard* (*a*), which was an action of assault and false impri-

(*a*) Post.

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sonment, tried before Lord Abinger at the London Sittings yesterday, the declaration stated an assault with a pistol loaded with powder, ball, and shot; and the plea as to the assault was, not guilty. Lord Abinger was of opinion, that it lay on the plaintiff to satisfy the jury that the pistol was loaded; for if it was not loaded, there was no assault (*a*). As to the prisoner's declarations on the subject, you must take into account the circumstances under which they were made, in answer to questions by the police improperly put, and perhaps incorrectly remembered on account of the excitement and confusion of the time. With respect to Lord Coke's opinion on the subject of insanity, medical science was in a very imperfect state then compared with what it is now. In the case of *Margaret Nicholson*, who was charged with attempting to stab the King, there was contrivance, yet the Privy Council sent her to Bedlam, and did not try her. In *Hadfield's case* there was more apparent motive than in the present. Here there is a great offence; and it is important to consider whether there was any motive. The definitions of insanity by Lord Coke and Lord Hale, are inconsistent with the cases in which insanity has been held to be a defence to a criminal charge. The papers found at the prisoner's lodgings shew that he insanely imagined himself connected with a political society, which had, in fact, no existence. If such a society had really existed, it would have been discovered. They have not traced him to any association of disaffected persons whatever; the letters addressed to himself, and praising his own speech, will be shewn to be in his own handwriting. The existence of these things shew previously a state of mind evidently being unsound. Then there are the circumstances of the case itself. Would he, if he had been sane, have acted so as to shew that he courted publicity? He does not take any precaution to favour his escape. Would he have said, "I am the person," if he had been sane? He delivers himself up to

(*a*) But see the case of *Regina* v. *St. George*, ante, p. 483.

the immediate vengeance of the people. I shall produce evidence of a tendency to that insane state, which burst out in a paroxysm. The prisoner's age is that at which the taint of hereditary insanity would be most likely to break out. The act itself may be the first decided indication of insanity; and we cannot, therefore, produce evidence of positive acts of insanity before the time of its commission. In a case tried before Mr. Justice Parke, at Aylesbury, where the prisoner was charged with the murder of his grandfather, I defended him; and though there was no proof of previous acts of insanity, yet the jury inferred insanity from the circumstances of the case, and he was acquitted on that ground. In the present case, the prisoner's grandfather died in a lunatic asylum, and his father also was mad. The absence, too, of the ordinary motives which induce sane criminals to commit crimes, is a strong argument in favour of the notion of the prisoner's insanity. There is an extraordinary case of delusion mentioned in the case of *Hadfield* (*a*), by Mr. Erskine, as having been related to him by Lord Mansfield:—" A man of the name of Wood had indicted Dr. Monro for keeping him as a prisoner. He underwent the most severe examination by the defendant's counsel without exposing his complaint; but being asked what was become of the princess whom he corresponded with in cherry juice, he shewed at once what he was; he said there was nothing at all in that, for having been (as everybody knew) imprisoned in a high tower, and being debarred the use of ink, he had no other means of correspondence but by writing his letters in cherry juice, and throwing them into the river which surrounded the tower, where the princess received them in a boat. There existed, of course, no tower, no imprisonment, no writing in cherry juice, no river, no boat; but the whole was the inveterate phantom of a morbid imagination." So, in the present case, as respects the prisoner

(*a*) 27 How. St. Tr. p. 1316.

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at the bar, there existed, in fact, no society called "Young England," no president, no secretary, no council; but all, like the tower, the cherry juice, the river, and the boat, was the inveterate phantom of the prisoner's morbid imagination. As to the case of *Earl Ferrers*, there was not the absence of motive, which distinguishes that case from the present. He acted from ungovernable rage, arising not from an unreal state of circumstances, but from real facts. The prisoner in the present case had no animosity against the Queen; he had not suffered from prosecution or imprisonment; he had no political associates; he could not have any motive for injuring her Majesty.

On the part of the prisoner, several witnesses, relatives and connexions of the family, were called to prove the state of mind of the prisoner's grandfather. They all stated, that, in their judgment, he was of unsound mind; but most of the instances they gave were rather instances of great violence of temper, and occasionally great excitement, especially after drinking, to which, being a seafaring man, he was somewhat addicted. However it appeared, that, towards the close of his life, when he was a pensioner in Greenwich Hospital, he had a complaint in his head, and sometimes he used to call himself the Pope of Rome, and at other times used to say that he was St. Paul, and that he had suffered the Pope of Rome to make his escape. This was when he was on duty at the gates of the hospital. It also appeared that he was in the habit of talking to himself for a considerable time, &c. The prisoner's mother was then called, and deposed to various acts of an extraordinary character committed by the prisoner's father, both before and after her marriage to him; such as burning a roll of bank notes, pulling out at different times a pistol, a razor, and a paper of oxalic acid, and threatening to kill himself in her presence; making grimaces at her when she was pregnant, and jumping about like a baboon. She stated that her second child, which she suckled at the same time as the prisoner,

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was a confirmed idiot, but that it lived nearly two years and a half; that it never spoke or walked, and showed no signs of understanding; that its cry was not human, and that it put out its tongue as the father had done when he made the grimaces. She further added, that on one occasion, her husband knocked her down and fractured her head; and on another occasion, stuck a file into her breast, which caused milk to flow out from the wound. With respect to the prisoner himself, the witness said, "The prisoner was born on the 19th of April, 1822; for the first seven years of his life he was under my care; he would burst out a crying when there was no one near him, and he was always very troublesome; it was different to the mere waywardness of childhood, and he has continued through life to cry without any apparent cause; he had a great many other very singular habits; he would get into a violent rage without any cause, and deliberately break anything, &c.; after gloomy fits, and fits of violent passion, he would laugh hysterically—it is an involuntary laugh; at times he was very affectionate, and at other times the contrary; he would break out unawares, &c.; he was sometimes very gloomy, he would sit for a long time with his hand to his head, and not speak; he was brought home one night by a policeman, who informed me he had been taken to the station-house; he had got behind a carriage, and had frightened a lady who was in it by making a great noise, and she was pregnant, and her husband, who was a solicitor, was exceedingly alarmed and angry; that was stated in his presence; I went next morning to inquire after the lady's health and apologise; he took no notice when he heard this account; he did not appear conscious of having done wrong, &c.; he has behaved violently towards me; the day before I went to Birmingham he made my nose bleed by a blow from his fist; I was playing with him, and turned round, and he hit me on the nose; that was not in the course of the play, it was after; he turned round suddenly as he was going

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through the door, and struck at me; it hurt me very much; I screamed out; the landlady came up stairs, and she said, 'If I was to strike my mother, I should expect my hand to drop off.' He appeared very sullen."

Several witnesses were called, who corroborated the mother's statement, both as to the prisoner and his father. The most material evidence as to the prisoner was given by an inspector of police, named Tedman, who saw him frequently for about eighteen months, during which he was barman at Mr. Minton's, the Shepherd and Flock public-house. Being asked upon what fact she founded his opinion that the prisoner was of unsound mind, he said, "I have gone in of a morning, and found him crying very much, with his hands before his face, and his apron before his face, with his hands up; I saw that frequently; I have asked him what was the matter; he said, 'Nothing, now it is all over;' I asked him if any one had ill-used him; he said 'No;' at other times I have found him laughing very much: I have asked him why he was laughing; he said, 'The old women drank so much gin, it would make any one laugh;' I said, There are no old women here now: he said, 'No, there is not;' he was by himself: on another occasion, a gentleman came in and ordered some stout, and Mr. Minton requested the prisoner to bottle it; he got the bottles all upside down in the basket, and was putting the funnel and stout in at the wrong end of the bottle, the bottom end; that was about eleven o'clock in the morning; I asked him what he did that for; he said, 'It is a jolly good *lark*;' he was filling the stout out of a can into the funnel; it ran all over the basket; there was no one with him; he was doing it without any one to look on; I think that is about two years ago; I told Mr. Minton he was acting like an idiot about the place, and he had better send him away; and he did leave in a day or two afterwards; he was at times very violent in his temper, and at other times very quiet, and would scarcely speak to any person."

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Several eminent medical men were also called for the prisoner. They were Dr. John Birt Davis, a physician of Birmingham, and coroner for that borough; Dr. Hodgkin, a lecturer on morbid anatomy, and author of several medical works; Dr. John Connolly, physician to the Hanwell Lunatic Asylum; Dr. Chowne, physician of Charing Cross Hospital; and Mr. J. F. Clarke, honorary secretary to the Westminster Medical Society. This last witness had been in the habit of attending the family of the prisoner, and had known the prisoner himself for two years. They all gave it as their decided opinion that he was of unsound mind (*a*).

Wilde, S. G., in reply.—The defence rests on three points: 1st, Whether the Queen was the object of the attack; 2ndly, Whether the pistols were loaded with ball; and 3rdly, What was the prisoner's condition of mind at the time when the act was done. As to the first two points, I do not think the question of insanity will have any considerable effect upon them; the commission of the fact is totally distinct from the responsibility that will result. As to the first point, whether the Queen was the object of attack, consider her situation in the country, and his question—"Is the Queen hurt?" If the prisoner was led by inordinate vanity, a desire of distinction, and to be the subject of popular report, he would assail the life of the Queen. There is nothing in the evidence pointing to any other individual. Then supposing that the Queen was the object of attack, were the pistols loaded with ball or not? The supposition of insanity would rather bear against the prisoner on this point. But consider what had been his previous conduct with the pistols; consider the purchase by him of the caps and balls, and the finding of balls and bullet-moulds in his

(*a*) No medical men were examined on the part of the prosecution, though it appeared that Mr. Maule, the solicitor to the Treasury, was present at an interview which those who were examined for the prisoner, had with him in Newgate.

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box. The case of *Blake* v. *Barnard*, cited for the defence on the subject of the pistols being loaded, has no analogy with the present case; because there was in that case the absence of all evidence of the possession of powder and balls, &c., which is not so here. The firing of the second pistol is a circumstance to shew that the intention was to produce death, and therefore that the pistols must have been loaded. But these circumstances are followed up by a direct admission that they were loaded with ball. The prisoner's remark, "If your head had come in contact with the ball, you would have found there was a ball in the pistol," tends to shew that the pistols were loaded. There is also the evidence of two persons who heard something whizzing. It is difficult, under such circumstances, to find the balls, and therefore the non-production of them is no evidence. As to the defence on the ground of insanity, the rule, as I understand it, is not subject to much ambiguity, and any difficulty that may arise will be in its application to the facts. Mr. Erskine's speech is considered by medical men as correct; and you may take the rule from what he said in defence of Hadfield. Lord Lyndhurst has correctly laid down the rule in *R.* v. *Offord* (*a*). Did the prisoner know that he was committing an offence against the law of God and nature? Mr. Erskine, in his speech in *Hadfield's case*, says: "Delusion, therefore, where there is no frenzy or raving madness, is the true character of insanity; and where it cannot be predicated of a man standing for life or death for a crime, he ought not, in my opinion, to be acquitted; and if Courts of law were to be governed by any other principle, every departure from sober, rational conduct, would be an emancipation from

(*a*) 5 C. & P. 168. His Lordship in that case told the jury, that they must be satisfied before they could acquit the prisoner on the ground of insanity, that he did not know when he committed the act, what the effect of it, if fatal, would be with reference to the crime of murder. The question was—"Did he know that he was committing an offence against the laws of God and nature?"

criminal justice." He afterwards says, "to deliver a lunatic from responsibility to criminal justice, above all, in a case of such atrocity as the present, the relation between the disease and the act should be apparent. Where the connexion is doubtful, the judgment should certainly be most indulgent, from the great difficulty of diving into the secret sources of a disordered mind; but still I think, that, as a doctrine of law, the delusion and the act should be connected." The question in this case will be, whether the prisoner, at the time he did the act, was in a situation to know right from wrong—to know that the act was one calculated to inflict death, and that its performance would subject him to punishment. This is put for the defence—1st, On the act itself; 2ndly, On hereditary taint, as it is called; and 3rdly, On the acts of the prisoner himself. As to the first branch, the test is that laid down by Mr. Erskine. Where will you find any delusion in connexion with the act? Evidence brought forward, when so serious a charge is made, ought to be received with great watchfulness, especially when given with reference to a person who has not been previously treated as a madman. With respect to the hereditary taint, the grandfather was treated in the Petworth affair as a criminal, and not as a lunatic, and was allowed to be discharged on a promise that he would go to London. On another occasion, he had a fever, and was put into a strait waistcoat. He was a drunken violent seaman. Is the descendant of such a man to be exempt from criminal responsibility? And as to the prisoner's father, from the evidence of the mother it does not appear that she considered him insane; because she married him, and his acts after she married were similar to his acts before. The prisoner himself was not treated as of unsound mind at any of the places where he lived. No medical man was consulted as to his state. He goes from one situation to another, remaining in one a year, and taken again, and going away afterwards with an ex-

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cellent character, suiting in every respect except that he had a habit of laughing. Mr. Parr, with whom he lived six months, considered him of sound mind. The propensity to indulge in uncontrolled laughter was an ailment which left him free to discharge his social duties, liable on his civil contracts, and amenable to the criminal law for any offence he might commit. In all the four services in which he lived, on what can the mind rest to relieve him from his civil contracts? On what can the mind rest to relieve him from his criminal responsibility? As to the documents found in the prisoner's box, they were evidently written to induce a belief that there was some extensive conspiracy existing. They shew that there was no imbecility—no idiocy, whatever it may be said there was of insanity. The prisoner may have been influenced by a morbid desire for distinction, but that will not excuse him from responsibility. He has not been shewn to have spoken to anybody about the society or his beautiful speech, which he would have done if he had been labouring under any delusion as to the existence of such a society. Hadfield's delusion was, that he was commissioned by Heaven to make himself a sacrifice to public justice. This is the best instance of the kind of delusion which relieves a man from responsibility; and the defence was, that although he shot in the direction of the King, yet he did not do so with an intention to kill him. Mark, therefore, the connexion, as Mr. Erskine put it, of the delusion with the act. If the prisoner in this case did the act, knowing it was a guilty act, for the sake of public notoriety, he is responsible, and must be found guilty. It is evident he knew that he was breaking the laws of God; let us see whether he knew that he was liable to punishment. His answers before the Privy Council shew that there was no imbecility. What you will have to say, therefore, will be, whether the prisoner was under any delusion when he committed the act, which delusion alters

the character of the act. If he thought he was doing an innocent act, and did not know that he was doing an illegal act which would subject him to criminal punishment, he must be acquitted; but otherwise, not. It is no matter what delusion he laboured under, if it was not a delusion connected with the act. In the case of Wood and the cherry juice, if he had committed a murder, would he not have been responsible? The letters written by the prisoner do not shew that the writer was deceived, but that he was trying to deceive others. The laughing and crying had no connexion with his mind; they were not shewn to spring from any supposed cause altogether imaginary. If, as I contend, the law requires that the prisoner should be shewn to have been in a state in which he did not know right from wrong—in which he did not know the nature and quality of the act he was committing—where is the evidence of his being in such a state? As to the medical witnesses, they do not give any evidence of his labouring under any delusion. They speak of a want of sensibility and emotion, but this you would naturally expect to find in a person who would commit such an offence as attempting the life of the Sovereign.

Lord DENMAN, C. J., (in summing up, after stating the crime and the overt acts), said—The questions for your consideration on the facts are, whether the prisoner did fire the pistols or either of them at her Majesty, and whether those pistols or either of them were or was loaded with ball, at the time when they were so fired. These are the matters of fact; and if you think they are proved, then you will have further to inquire whether the prisoner was in possession of his reason, so as to be responsible for what he did. These matters are quite distinct, and I think it will be the better way to abstain from making any remark upon the defence, until I have gone through the facts proved on the part of the prosecution, as to the com-

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mission of the act itself. [His Lordship read the evidence for the prosecution, commenting occasionally on it as he passed along. On the point as to whether the pistols were loaded or not he observed]—one witness says, "the prisoner was about five or six yards from the carriage when he discharged the pistol, and on the right side of it; the report of the pistol attracted my attention; and I had a distinct whizzing or buzzing before my eyes, between my face and the carriage:" and another witness says, "it seemed something that whizzed past my ear; as I stood, it seemed like something quick passing my ear, but what I could not say." This is the only direct evidence. I have no means of furnishing you with any observation on that evidence; it is not matter of law, and you must bring your experience to bear upon it, and couple it with the other facts of the case. With respect to the letters written by the prisoner, whether he really believed in the existence of any such society as is mentioned in them, or was only amusing himself with supposing the existence of such a society, is a matter which we cannot determine otherwise than by conjecture. Then the very important question comes, whether the prisoner was of unsound mind at the time when the act was done? Persons primâ facie must be taken to be of sound mind till the contrary is shewn. But a person may commit a criminal act, and yet not be responsible. If some controlling disease was, in truth, the acting power within him which he could not resist, then he will not be responsible. It is not more important than difficult to lay down the rule by which you are to be governed. Many cases have been referred to upon the subject. But it is a sort of matter in which you cannot expect any precedent to be found. It is the duty of the Court to lay down the rule of the English law on the subject; and even that is difficult, because the Court would not wish to lay down more than is necessary in the particular case. As to *Hadfield's case* Mr. Erskine would lose

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nothing by laying down the rule most widely. It must not therefore be said, that the admission of the counsel is to decide the matter. On the part of the defence it is contended, that the prisoner at the bar was non compos mentis, that is (as it has been said), unable to distinguish right from wrong, or, in other words, that from the effect of a diseased mind he did not know at the time that the act he did was wrong. As to the grandfather, two points will arise, whether his conduct was evidence of insanity or only of violence of disposition; and if of insanity, whether the insanity was or was not hereditary? [His Lordship read the evidence of the medical and other witnesses on the subject of the insanity, and said]—It may be that medical men may be more in the habit of observing cases of this kind than other persons; and there may be cases in which medical testimony may be essential; but I cannot agree with the notion that moral insanity can be better judged of by medical men than by others. As to the father of the prisoner, the question will be, whether there was a real absence of the power of reason—the power of controlling himself, or whether it was only a violent, or even a cruel disposition: and then, upon the whole, the question will be, whether all that has been proved about the prisoner at the bar shews that he was insane at the time when the act was done—whether the evidence given proves a disease in the mind as of a person quite incapable of distinguishing right from wrong. Something has been said about the power to contract, and to make a will. But I think that those things do not supply any test. The question is, whether the prisoner was labouring under that species of insanity which satisfies you that he was quite unaware of the nature, character, and consequences of the act he was committing, or, in other words, whether he was under the influence of a diseased mind, and was really unconscious at the time he was committing the act, that it was a crime. With respect to

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the letters and papers they may be brought forward on either side of the question.

The Jury retired for some time, and then brought in the following verdict, which the foreman read from a paper:—

> "We find the prisoner Edward Oxford guilty of discharging the contents of two pistols at her Majesty; but whether they were loaded with ball or not, there is not satisfactory evidence, and that the prisoner was of unsound mind at the time of committing the offence."

Upon this a question arose as to whether the prisoner could be kept in custody or not, the *Attorney-General* requiring that he should be detained, and the prisoner's counsel contending that the verdict was a general acquittal, which entitled the prisoner to his discharge.

Lord DENMAN, C. J., told the Jury that if they had not considered the question as to the loading of the pistols distinctly and separately, they had better retire again and consider it, and find the prisoner either guilty or not guilty.

The Jury at first said they had so considered it, but afterwards expressed a willingness to retire again.

Lord DENMAN, C. J.—Yow will consider whether the prisoner discharged a loaded pistol.

One of the Jury—Loaded with a bullet?

Lord DENMAN, C. J.—Or a ball.

ALDERSON, B.—Not with powder and wadding only (*a*).

(*a*) In the case of *Rex* v. *Hughes & Worsley*, ante, Vol. 5, p. 126, it was decided, that if an indictment for shooting another with intent to

The Jury retired to reconsider their verdict, and during their absence a discussion took place as to what was to be done in the event of their finding the prisoner not guilty upon the facts.

Campbell, A. G.—The stat. 39 & 40 Geo. 3, c. 94, s. 1, provides that, if upon a trial for treason, murder, or felony, insanity at the time of committing the offence is given in evidence, and the jury acquit, they must be required to find specially whether the prisoner was insane at the time of the commission of the offence, and whether he was acquitted on that account; and if they find in the affirmative the Court must order him to be kept in custody till her Majesty's pleasure be known. Now I will assume for the purposes of the argument, that the jury have acquitted the prisoner, still I contend that these questions must be asked by the Court.

ALDERSON, B.—The statute speaks of "the commission of the offence;" now the jury say, that there has been no offence committed.

Campbell, A. G.—Those words mean the act done.

ALDERSON, B.—What act done?

J. S. Taylor, for the prisoner.—The act done is the compassing the Queen's death. The overt act is not the offence, it is only the evidence of it.

PATTESON, J.—The word "offence;" cannot mean crime

murder, &c., in all the counts aver that the pistol was loaded with powder and a leaden bullet, it must appear that the pistol was loaded with a bullet, or the prisoner will be entitled to an acquittal.

But see the case of *Rex* v. *Kitchen*, Russ. & Ry. C. C. R. 95, cited in a note to *Rex* v. *Hughes*, and the case of *Rex* v. *Martin*, ante, Vol. 5, p, 128.

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because if the party was insane, he cannot have committed a crime.

Bodkin, for the prisoner.—Suppose the jury had found that the prisoner discharged the pistols, but not at the Queen at all.

ALDERSON, B.—Suppose they had found that he was not the person?

Lord DENMAN, C. J.—My view of the case is this: the statute must mean that the jury are to find, that that act has been done by the prisoner which fixes him as a criminal unless he is a lunatic.

ALDERSON, B., (to the Attorney-General).—The construction you contend for would lead to this, that if a man were charged with an offence, and the jury thought that no offence had been committed at all, yet he must be handed over to the mercy of the Crown perhaps for his life.

J. S. Taylor.—Suppose the charge were one subjecting the party only to six months imprisonment if convicted?

Campbell, A. G.—If no evidence of insanity had been given, then the prisoner would have been entitled to his discharge; but if a prisoner sets up the defence of insanity he does it at the peril of the finding of the jury.

PATTESON, J.—Then the latter part of the clause is wholly useless.

ALDERSON, B.—The word "offence" must mean that which in a sane person would be an offence.

Lord DENMAN, C. J.—That, it seems to me, must be the

meaning. But none of us mean to be bound by what we now say; it is much too important a matter (*a*).

The Jury, soon after this discussion ended, returned again into Court, and found the prisoner—

Not guilty, he being insane at the time. The Court ordered him to be detained in prison.

Campbell, A. G., *Wilde*, S. G., Sir *F. Pollock*, *Adolphus*, *Wightman*, and R. *Gurney*, for the Crown.

J. Sydney Taylor, and *Bodkin*, for the prisoner.

[Attornies—*Maule* and *Pelham*.]

(*a*) Notwithstanding this statement made at the moment by the learned Chief Justice, the words of the statute seem on consideration to be so clear on the point, that we have not thought it right to omit the discussion, being satisfied that there is no probability of the opinion expressed being overruled.

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AUGUST SESSION, 1840.

BEFORE MR. BARON GURNEY.

REGINA *v.* JOHN PHETHEON.

Aug. 21.

The defence to a charge of stealing, that the prisoner pledged the property, intending to redeem and restore it, is a defence not to be generally encouraged; though, if clearly made out in proof, it may be allowed to prevail. The rule for the jury's guidance in such a case seems to be that, if it clearly appear that the prisoner only intended to raise money upon the property for a temporary purpose, and at the time of pledging the article had a reasonable and fair expectation of being enabled shortly by the receipt of money, to take it out and restore it, he ought to be acquitted; but otherwise, not.

THE prisoner was indicted for stealing, on the 26th of February, 1840, four salt cellars and other articles of silver plate of the value altogether of 18*l.* 5*s.*, the goods of Thomas Robert Baron Hay, his master, in his dwelling-house.

It appeared that the prisoner was under butler to Lord Hay, and while he was in the service pledged the articles mentioned in the indictment.

The jury found the prisoner guilty; but recommended him to mercy, on the ground that they believed he intended to replace the property.

C. C. Jones, for the prisoner, submitted that this finding amounted in law to a verdict of not guilty.

GURNEY, B., without expressing any opinion upon the point, directed that the prisoner should be tried upon another indictment which had been preferred against him.

The prisoner was accordingly charged with stealing on the 6th of November, 1839, one silver saucepan of the value of 2*l.* 10*s.*, the goods of the same prosecutor.

It appeared from the testimony of a servant of Lord Hay, who was more generally known by his Scotch title of Earl of Kinnoul, that the saucepan mentioned in the indictment, was last seen by him upwards of two years pre-

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vious, at Duplin Castle, in Perthshire, where it was in use in Lady Kinnoul's apartment.

A witness proved, that, on the 16th of July, 1840, the prisoner called upon him, and left a parcel with him, which, on being opened, was found to contain ten pawnbroker's duplicates, from one of which it appeared that the silver saucepan was pledged at the shop of a pawnbroker, named Mills, in the Edgeware Road, for 2*l.* 10*s.*, by a young woman.

The prisoner was in the service of Lord Kinnoul, at Duplin Castle, at the time the saucepan was in use there, and followed the family to England, in the month of April, 1838; and a witness stated that, in the natural course of things, the saucepan would come to England with the other property.

C. C. Jones, in his address to the jury for the prisoner, asked them to consider whether the prisoner took the article in question feloniously, or whether he took it, intending at the time he sent it to the pawnbroker's, to redeem it as soon as he could. He argued, that the fact of the prisoner's having kept the duplicate was a strong circumstance to shew that he intended to redeem the property.

GURNEY, B., in his summing up, after stating the facts, observed: You will say whether the prisoner stole this property or not. I confess I think, that if this doctrine of an intention to redeem property is to prevail, Courts of justice will be of very little use. A more glorious doctrine for thieves it would be difficult to discover, but a more injurious doctrine for honest men cannot well be imagined.

The Jury found the prisoner guilty, and he was sentenced to be transported for fourteen years.

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REGINA v. PRETHERON.

Bodkin and *Ballantine*, for the prosecution.

C. Chadwicke Jones, for the prisoner.

[Attornies—*W. C. Humphreys* and ———.]

In Carrington's Supplement to the Criminal Law, p. 278, 3rd edition, the following case is reported:—On an indictment for larceny by a servant in stealing his master's plate, it appeared, that, after the plate in question was missed, but before complaint made to the magistrate, the prisoner replaced it; and it was proved by a pawnbroker, that the plate had been pawned by the prisoner who had redeemed it: and, the pawnbroker also stated, that the prisoner had on previous occasions pawned plate and afterwards redeemed it. *Hullock*, B. (*Holroyd*, J., being present) left it to the jury to say whether the prisoner took the plate with intent to steal it, or whether he merely took it to raise money on it for a time, and then return it; for that in the latter case it was no larceny. The jury acquitted the prisoner: *R.* v. *Wright*, O. B., 1828, MS.

This decision has given rise to much discussion in various cases; and much difficulty has been found in applying the doctrine it lays down, to the facts of particular transactions. In some instances, where it has appeared clearly that the party only intended to raise money on the property for a temporary purpose, and, at the time of pledging the article, had a reasonable and fair expectation of being able shortly, by the receipt of money, to take it out of pawn, juries under the advice of the Judge have acted upon the doctrine and acquitted. But in other instances, where they could not discover any reasonable prospect which the party had at the time of pledging of being able soon to redeem the article, they have considered the doctrine as inapplicable and have convicted.

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OCTOBER SESSION, 1840.

BEFORE MR. JUSTICE ERSKINE.

REGINA *v.* SIMON LYONS.

Oct. 24th.

Whether a person charged as a principal in the same indictment with a person charged as accessary, is a competent witness against the accessary, without being first either acquitted or confessing and suffering his punishment:— *Quære?* Whether a statement that the principal felon stole the property, which statement is in the usual form of an indictment for larceny except that it gives no addition to the prisoner's name, and does not contain the words contra pacem, &c., is in law an indictment against the principal, or merely inducement to the statement of the charge against the accessary?— *Quære?* But semble that it is an indictment.

THERE were three indictments against the prisoner, which were the same in all respects except the time.

The first indictment stated, that James Edward O'Brien [not giving him any residence or addition] on the 8th of September stole seven sovereigns, the monies of David O'Brien in his dwelling-house, [and not concluding contra pacem &c.], and that the prisoner feloniously incited him to commit the felony. There was also a count charging the prisoner as receiver.

C. C. Jones, for the prosecution, which was instituted by the father of James Edward O'Brien, stated to the learned Judge, that the lad in his (Mr. Jones's) absence had been arraigned and pleaded guilty, and he was desirous, on the part of the prosecutor, of getting rid of that confession, and examining the lad as a witness against Lyons, without his being under the stigma of a conviction of felony.

ERSKINE, J., doubted if this could be done.

C. C. Jones.—A person may be examined as a witness previous to conviction.

ERSKINE, J.—Not where he is indicted in the same indictment. I never heard of such a thing.

C. C. Jones.—But this is not an indictment as against

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the principal, but an indictment against the accessary for a substantive offence.

ERSKINE, J.—I have great difficulty in saying that the principal is not indicted.

C. Phillips, for the prisoner Lyons.—In what other form could O'Brien be indicted (*a*)?

C. C. Jones.—I admit that the indictment is in the usual form, except in the omission of the description of O'Brien, and of the contra pacem (*b*). But I submit that there was no other way in which the offence could be stated. I submit, that it is not an indictment against the principal, but merely inducement to the statement of the charge against the accessary.

ERSKINE, J.—This question does not arise at this time. If the lad himself desires it, I will allow him to retract his plea of guilty, and not call on him to plead again now. It may not be necessary. When he is called as a witness then will arise the question, whether he, being himself charged in the same indictment, can be a witness or not. The boy may have a nominal sentence passed on him, and then he will be a competent witness.

C. C. Jones.—In Roscoe's Crim. Dig. p. 117, it is said, as to accomplices—"Even where the accomplice has been

(*a*) The statement on the record, as it related to O'Brien, though not in strictness of law a perfect indictment, was yet in a form on which, if no objection were taken before verdict, a prisoner might be convicted and punished. For the reasons for this opinion see note (*b*). It seems also to come within the definition of an indictment which is "a written accusation of one or more persons of a crime, preferred to and presented on oath by a Grand Jury."

(*b*) The *want of an addition* to a prisoner's name is an objection to an indictment; but it is provided by the stat. 7 Geo. 4, c. 64, s. 19, that if the objection be pleaded by the prisoner, the Court may order the indictment to be amended. As to the omission of the words "against the peace," &c., it is provided, by the 7 Geo. 4, c. 64, s. 20, inter alia, that no judgment shall be stayed or reversed on account of such omission.

joined in the same indictment with the prisoner he may still be called as a witness before he is convicted," and reference is made to Hale. P. C. b. 2, 46, s. 95. There is also this further statement—"It is said, that an accomplice indicted with another is an admissible evidence, *if he be not put on his trial*, 2 Stark. Ev. 2nd edit.; 2 Russell, 597. In strictness, however, there does not seem to be any objection to the admitting of the witness at any time before conviction."

ERSKINE, J.—It goes on to add, "The party that is the witness, says Lord Hale, is never indicted; because that much weakens and disparages his testimony, but probably does not wholly take away his testimony." And at p. 118, it is said, "When the accomplice has been joined in the indictment, and before the case comes on it appears that his evidence will be required, the usual practice is, before opening the case, to apply to have the accomplice acquitted." And again, "Where a party had been joined in the indictment, and it was intended to call him as a witness for the prosecution, it was formerly the practice to enter a nolle prosequi as to him"(*a*).

The lad was then asked by the officer of the Court, whether he wished to retract his plea of guilty; he answered in the affirmative, and was allowed to do so.

ERSKINE, J., then said,—the course will be, that the lad

(*a*) All the passages above cited are under the head of accomplices. At page 118, under the head of "Principal Felon," it is said upon an indictment against a receiver, "the principal felon, when not convicted, may be admitted as a witness against the defendant. This was allowed on the repealed stat. 22 Geo. 3, c. 28:—*Patram's case*, 2 East, P. C. 782; and in a prosecution on the stat. 4 Geo. 1, c. 11, for taking a reward to help to stolen goods. *Wild's case*, Id. 783; 1 Leach, 21 (n); *Haslam's case*, Id. 782; 2 Leach, 467."

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will be put into the witness box, and then the objection will be made that he is not competent, being himself charged in the same indictment; and your answer to that objection will be, first, that he is not so charged; and secondly, that if he is, yet still he is a competent witness: and I shall admit the witness, and reserve the question for the opinion of the Judges.

C. C. Jones then inquired what was to become of the lad till the questions were ultimately decided, and being informed by his Lordship that he must remain in prison, stated that he would rather, under such circumstances, that he should plead guilty and receive a nominal punishment.

This was accordingly done, the lad pleaded guilty to all three charges, and was sentenced to imprisonment for one day on each.

The trial of Lyons then proceeded, and the lad was examined as a witness against him.

The Jury found him guilty, and he was sentenced to be transported for ten years.

C. Chadwick Jones, for the prosecution.

C. Phillips, for the prisoner.

COURT OF QUEEN'S BENCH.

Adjourned Sittings in London after Trinity Term, 1840.

BEFORE LORD DENMAN, C. J.

RAINY *v.* VERNON.

1840.
July 13*th*.

The plaintiff was employed to sell ground rents by auction, on the terms of receiving a commission of one per cent. "on sale." After he had advertised the sale, but before the day of sale, the defendant sold the ground rents by private contract. Three auctioneers proved the custom of the trade to be, that after an auctioneer was employed and the property advertised by him, he was entitled to the full commission on a sale being effected, although not through his direct agency.

The question left to the jury was, whether this custom was *so notorious*, that the defendant must have known it; and that if so, it was engrafted in the contract.

The Jury found for the plaintiff for the full commission.

ASSUMPSIT for the "work, labour, care, and diligence and attendance of the plaintiff, by him then done and performed and bestowed, in and about the business of the defendant, and at his request;" with counts for money paid, and on an account stated.

Pleas.—1st, As to all but the sum of 47*l*. 6*s*. 6*d*., non assumpsit; 2ndly, as to that sum, payment of it into Court; 3rdly, a set-off for money had and received.

Replication—accepting the money paid into Court in satisfaction of the causes of action in the introductory part of the second plea mentioned, and denying the set-off.

It was opened by Sir *W. Follett* for the plaintiff, that the only real question in the cause was, whether the plaintiff, who was an auctioneer, was entitled to commission on the sale of certain ground rents, which he had been employed to advertise and had announced for sale by auction, but which had been sold by private contract by the defendant's solicitor, after they had been announced for sale by auction. He cited the case of *Driver* v. *Cholmondeley* (*a*),

(*a*) The case of *Driver and another* v. *Cholmondeley and another*, was tried in the Court of Queen's Bench before Lord *Denman* and a

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and submitted that, after the defendant had employed the plaintiff to sell by auction, and after the plaintiff had accordingly offered the property for sale, the defendant had no right to say that the plaintiff was to have anything less than his full commission.

On the part of the plaintiff a letter from Mr. Garrard, the solicitor of the defendant, addressed to the plaintiff, was given in evidence, and by this letter the plaintiff was authorized to offer the ground rents for sale by auction, and by it Mr. Garrard acceded to the terms mentioned by the plaintiff in a former letter,—that the plaintiff was to receive a commission of one per cent. "on sale."

It was proved by a clerk of the plaintiff that the plaintiff had caused particulars of the ground rents to be printed, and also had caused advertisements for the sale of them to be inserted in the newspapers, and hand-bills to be printed, and had also answered inquiries respecting them; and it was proved by Mr. Baker, a solicitor, that he had applied to the plaintiff for the particulars and price of the ground rents on the behalf a lady named Beecham, who afterwards became the purchaser of them for £21,500, the purchase being completed through the agency of Mr. Garrard, the solicitor of the defendant, and not through the agency of the plaintiff; it being stated by Mr. Baker, in his cross-examination, that he went to Mr. Garrard because his client was anxious to leave town.

To prove the usage with respect to auctioneers' commis-

special jury, at the sittings after Michaelmas Term, 1835. The plaintiffs claimed commission on the sale of property sold by private contract by one of the defendants for £128,500, after the plaintiffs had been employed to sell it. The commission claimed was one per cent. One of the principal points relied on for the defendants was, that, admitting the plaintiffs to have been employed upon the terms of receiving one per cent. as their commission on the purchase-money, the true meaning of the agreement was, that such commission was not to become payable unless the sale was effected by the plaintiffs themselves, and that the agreement for the sale, having been made by one of the defendants, the plaintiffs had not become entitled to their commission. The verdict was for the plaintiffs.

missions, Mr. Winstanley was called. He stated that he had been engaged as an auctioneer for forty years, and that, where an auctioneer was employed and a sale advertized, and before the sale the property was sold by the owner himself, the usage was for the auctioneer to receive his commission; and in his cross-examination he said, "If the particulars are prepared before the auctioneer is employed, that makes no difference. It would be the same as if the auctioneer had received the information and prepared them. If the auctioneer inserts advertisements, and calls the attention of the public to the property, and brings forward a person who eventually becomes the purchaser, the auctioneer always is paid his commission."

The evidence of Mr. Winstanley was confirmed by that of Mr. Shuttleworth, and Mr. Hoggart, both of them auctioneers of considerable experience; and the latter said, "The usage is for the auctioneer to receive his commission after he is employed, however the property may be sold. The amount of commission does not depend on whether the auctioneer does much or little. The usual course of proceeding is to advertise and send out particulars. A good deal is done by connexion.—The plaintiff has a large connexion."

Thesiger addressed the jury for the defendant.—I may admit, that, where the whole trouble is taken by the auctioneer, he may be entitled to his commission; but here the particulars were prepared by Mr. Garrard, and the plaintiff had in fact very little to do. It is quite unreasonable that the plaintiff should be paid one per cent. under these circumstances, and if he is to be paid for his actual trouble, a sum of fifty guineas has been paid to him for that, beyond the expenses that the plaintiff has incurred.

For the defendant, Mr. Garrard was called. He said, "In the year 1838 the defendant consulted me respecting the

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sale of the ground rents. I prepared particulars, which were printed and a great many distributed. In February I applied to the plaintiff at the defendant's request. I sent the plaintiff the particulars, which he divided into several lots: the plaintiff was not authorized to sell for less than £23,000. Nothing was said respecting my selling by private contract, and nothing was said as to what was to be done if the sale was by private contract. If there was no sale at all, the plaintiff was not to be paid anything. I consider 51*l.* 10*s.* more than a remunerative price for the plaintiff's trouble."

Sir *W. Follett,* in reply.—Mr. Garrard's evidence does not vary the case at all. The plaintiff was employed in the ordinary way. I do not offer evidence as to the value of the work, and there are no means before you of knowing it. I rely on the contract made on the usage to receive commission, and the implied contract founded on the usage cannot be varied without an express stipulation.

Lord DENMAN, C. J., (in summing up.)—This is an action for commission on the sale of ground rents; and if you think the plaintiff is entitled to commission, the verdict ought to be for him. If there was an express contract that could not be varied; but that is not so here, and the plaintiff wishes to engraft on the contract this custom of the trade, by which, on a sale, although not by the auctioneer, the full commission is payable, and the three auctioneers who have been called prove this to be the custom. Now if you are satisfied that those three gentlemen prove a usage so notorious that the party must have known it, then it becomes a part of the contract. If the custom, however, is not so notorious, it would not be engrafted on the contract, and then a fair value only for the plaintiff's services is to be given, and you will say what is in your judgment a reasonable remuneration, whether 51*l.* 10*s.* or any greater sum. If, however, you think that the wit-

nesses called for the plaintiff have, by their evidence, made out a case of usage so notorious that the defendant was aware of it, then the custom is engrafted on the contract, and the plaintiff is entitled to his commission (*a*).

Verdict for the plaintiff for the amount of the commission (*b*).

Sir *W. Follett*, and *Montague Smith*, for the plaintiff.

Thesiger, and *F. Robinson*, for the defendant.

[Attornies—*C. P. Dimond* and *Jennings, Bolton & Jennings.*]

(*a*) See the case of *Wood* v. *Wood*, ante, Vol. 1, p. 59.

(*b*) Sir Edward Sugden says, (Vend. & Pur. 10th ed., Vol. 1, p. 71,) "The auctioneer is, of course, entitled to a fair remuneration for his labour; the amount must generally depend upon private agreement, although, where there is no special agreement, and there is a particular commission commonly charged, and the seller was aware of the custom, that would undoubtedly, in most cases, be the measure of the allowance. It would be difficult in any case to recover an unwarrantable or exorbitant commission. Upon large sales this difficulty is mostly obviated by making a contract beforehand with the auctioneer. Mr. Justice *Lawrence*, upon one occasion, observed (in the case of *Tomkins* v. *White*, K. B., 1806, reported, 3 Smith Rep. 440), that, 'considering the great sums of money which auctioneers were paid for preparing particulars and selling estates, they ought to be more correct. They contended some time ago (he added) that they were entitled to have the full sum of £5 per cent. commission, even if a man advertised an estate to be sold by auction, and it was afterwards sold by private contract, and then they contended for half the full commission.' If several land agents are employed to sell an estate, one who finds a purchaser may be entitled to a commission for so doing, although the purchase is made of another of the agents who receives his commission; but the jury are not bound to give what is termed the usual commission for finding a purchaser, viz., £2 per cent. If an agent for sale of an estate is to be paid a per centage on the sum obtained, he cannot recover his commission until the money is received by the principal. If therefore it is paid into the Bank under an act of Parliament, by the authority of which the property was purchased, the commission is not recoverable until at least the seller's right to the money is ascertained; and it is owing to his wilful default that he has not received it." See also the case of *Murray* v. *Currie*, ante, Vol. 7, p. 584.

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BEFORE MR. JUSTICE COLERIDGE.

(*Who sat for Lord Denman, C. J.*)

POPE and Another *v.* ANDREWS.

In an action for goods sold the defendant pleaded that the defendant and M. had agreed with the plaintiffs that M. should give a guarantee for payment of the debt by instalments, and that the guarantee was given and was accepted by the plaintiffs in satisfaction. Replication—denying the agreement, and denying that the plaintiffs had accepted the guarantee in satisfaction. It appeared that, before the bringing of the action Mr. L., who was the plaintiff's attorney on the record, had written to the defendant for payment of the debt, and it was proposed to give evidence of what Mr. L. had said after he had so written and before the action;—*Held*, that such evidence was not receivable without further proof of the agency of Mr. L. It was afterwards proved by Mr. L. that M. had asked him to propose to the plaintiff to accept his guarantee, and that Mr. L. having consented to do so, M. signed a guarantee, which was on the next day sent by Mr. L. to the plaintiffs, who kept it three weeks and then returned it.

Held, that if the plaintiffs did not return the guarantee within a reasonable time they must be taken to have accepted it, and that unexplained—three weeks was an unreasonable time:—*Held*, also, that if M. was worth nothing, and was a mere man of straw, that fact would make no difference on these pleadings, as the plaintiffs had not replied fraud, but had denied that they had accepted the guarantee.

DEBT by the plaintiffs, as surviving partners of Samuel Pope, for goods sold, and on an account stated. Pleas—as to all except 15*l.* 14*s.*, nunquam indebitatus; and as to that sum that there was an agreement entered into between the plaintiffs (by Lewis Grave & Co., their agents), George Maddick and the defendant, that the sum of 15*l.* 14*s.* should be paid by the defendant to Lewis Grave & Co. by instalments of 5*s.* a fortnight, the first instalment to be payable on the 1st of February, 1840, and that, in consideration of the plaintiffs' so accepting payment, the instalments should be guaranteed by George Maddick; and the plea went on to aver that Maddick, by a memorandum in writing, guaranteed the payment of the instalments, and that the defendant and Maddick gave and entered into the guarantee and agreement in full satisfaction of the sum of 15*l.* 14*s.*, and of all damages sustained by the detention thereof. The plea also averred a tender of the instalment due on the 1st of February, and that the defendant was at all times ready to pay it (concluding with a verification). Replication, as to all but the sum of 15*l.* 14*s.*, a nolle prosequi, and as to that sum a denial of the agreement men-

tioned in the plea, and of the acceptance of the guarantee and agreement in satisfaction and discharge of the sum of 15*l.* 14*s.*, and of all damages for the detention thereof, in manner and form &c., (concluding to the country).

The defendant's counsel began, and it was opened by *Platt*, for the defendant, that this debt which had been due from the defendant to the plaintiffs, who had retired from business, had been assigned (with other debts) to Messrs. Grave & Co., and that a friend of the defendant named Maddick, had agreed with Mr. Lake, the attorney for Messrs. Grave & Co., to give a guarantee for payment of this debt by instalments, and that that guarantee was accordingly given; but that after the Messrs. Grave & Co. had kept it three weeks they returned the guarantee and wished to break the bargain, which he submitted they could not do.

It appeared that the present action was commenced on the 22nd of February, 1840; and it was proposed on the part of the defendant, to give evidence of what Mr. Lake, the plaintiff's attorney on the record, had said before the action was brought.

W. H. Watson, for the plaintiffs.—I submit that what the attorney on the record said before the action was brought, is not receivable in evidence. In the case of *Wagstaff* v. *Wilson* it was held, that a letter written to the plaintiff's attorney before action brought by the attorney, who afterwards appeared as attorney on the record for the defendant, was not evidence of a fact admitted therein, without further proof that the defendant authorized the communication (*a*).

(*a*) 4 B. & Ad. 339. In the case of *Marshall* v. *Cliff*, 4 Camp. 133, which was an action against the owners of a ship, it was held to be sufficient primâ facie evidence of ownership, to put in an undertaking to appear for them before the commencement of the action, by the person who subsequently acted as their attorney in defending it, in which he described them as owners; but in the case of *Wagstaff* v. *Wilson*,

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Platt—I will put in the letter of Messrs. Farrar & Lake, demanding payment of the money.

The letter was put in: it was a letter from Messrs. Farrar & Lake to the defendant, dated the 8th of January, 1840, demanding payment of the debt, and stating, that if it was not paid within a week, legal proceedings would be commenced.

G. T. White, for the plaintiff, now proposed to go into evidence of what Mr. Lake had said, after the writing of this letter and before the bringing of the action.

W. H. Watson.—That is not made evidence by the letter which has been put in.

Platt.—It is shewn that Messrs. Farrar & Lake wrote to demand payment.

COLERIDGE, J.—You must carry it to this extent, that if Messrs. Farrar & Lake had compromised the matter, the plaintiffs would have been bound by it. You must shew an acquiescence in this agreement for a guarantee by the plaintiffs, or by Messrs. Grave & Co. The guarantee being kept by Messrs. Farrar & Lake would come to nothing, except you shew an authority from either the plaintiffs or Grave & Co. for making the agreement, or a ratification afterwards.

Mr. Justice J. *Parke* says, "In *Marshall* v. *Cliff* the attorney's letter relied on to prove the joint ownership of the defendants contained an undertaking to appear for them. That was a step in the cause. In *Roberts* v. *Lady Gresley* [ante, Vol. 3, p. 380,] the party whose letter was produced and whose agency was relied upon, had already acted as agent for the defendant, and Lord *Tenterden* thought there was evidence to go to the jury that he continued so when the letter was written." See the cases of *Wilmot* v. *Smith*, ante, Vol. 3, p. 453; *Peyton* v. *Governor of St. Thomas's Hospital*, Id., p. 363; *Roberts* v. *Lady Gresley*, Id., p. 380.

The evidence was not given.

On the part of the defendant Mr. Lake was called. He said—"We were concerned for Messrs. Grave & Co. to procure payment of this debt; on the 25th of January, 1840, a person named Maddick came and asked for indulgence, and I told him we could not agree to an offer he had made – of paying half-a-crown a week; on the 30th he came again and offered five shillings a fortnight; he wished me to make the offer to the plaintiffs; I at first said it was of no use, but at last consented to do so and sketched out a guaranteee and Maddick signed it; I don't remember that it was mentioned when I was to give an answer; I communicated this to Messrs. Grave & Co. on the next day, and sent them the guarantee; I did not receive the guarantee back from them till the 20th of February, and never notified the repudiation of it to the defendant or to Maddick till the 21st."

W. H. Watson.—The guarantee was only accepted conditionally, and Messrs. Grave afterwards repudiated it. During the three weeks from the 30th of January to the 21st of February no communication takes place.

COLERIDGE, J.—It appears to me on Mr. Lake's evidence to stand thus:—Mr. Lake had no authority proprio marte to bind either the plaintiffs or Messrs. Grave & Co., but when Maddick makes the proposal Mr. Lake says he will submit it to the plaintiffs, and they keep the guarantee for three weeks. It seems to me, that unexplained, that is too long a time, and as they had not returned it before they cannot do so then.

W. H. Watson addressed the jury for the plaintiffs, and called witnesses with a view of shewing that Maddick was a person who had no property, and whose guarantee was therefore valueless, but one of the witnesses stated that

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he informed Messrs. Grave & Co. of this as early as the 5th of February.

COLERIDGE, J., (in summing up).—The question is, whether the plaintiffs have accepted this guarantee. As to any oral assent or any assent in writing it is not even suggested; but a party may assent by act as well as by word, and the defendant here alleges, that the plaintiffs by their act have accepted this guarantee. If a person offers a guarantee, and more still, if he signs a guarantee by which he makes himself liable, and that be sent to the other party, such other party, if he means not to accept the guarantee, is bound expressly to dissent within a reasonable time; and if he keeps the guarantee an unreasonable time, he is bound to accept it just the same as if he had assented to it by words; and if he has ever accepted it either by word or by act, he cannot afterwards retract. It appears in the present case, that this debt was due from the defendant to Pope & Co., who retired from business and assigned this debt to Grave & Co., and that on the 8th of January Messrs. Farrar & Lake apply for payment, and threaten legal proceedings if the money is not paid. After this a person named Maddick wishes Mr. Lake to propose to Messrs. Grave that the money should be paid by instalments on Maddick's guarantee. Mr. Lake at first declines to make the proposal, but at last says that he will do so, and draws a guarantee which Maddick signs, and which is dated on the 30th of January. The question then is, whether the plaintiffs accepted this guarantee. The plaintiffs now say that Maddick was a mere man of straw; but even if that be so, it is unimportant on these pleadings, as the plaintiffs do not reply that they were induced to accept the guarantee by misrepresentation and fraud, but they deny that they ever accepted it all. You will therefore consider whether the plaintiffs have kept this guarantee so long a time without repudiating it, that they must be taken to have accepted it. At an earlier

stage of the cause I gave an opinion that they have, and I still am of that opinion. It is stated by one of the witnesses, that he informed Messrs. Grave & Co. that Maddick was worth nothing as early as the 5th of February; but, instead of returning the guarantee on that day, Messrs. Grave & Co. kept it till the 21st: and I own that it seems to me that they have kept it for an unreasonable time; for, according to their own statement, they on the 5th of February, had had the information on which they determined not to accept it, and yet they don't return it to Mr. Lake to send back to the defendant till the 21st.

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Verdict for the defendant.

W. H. Watson, for the plaintiffs.

Platt, and *G. T. White*, for the defendant.

[Attornies—*Farrar & Lake*, and *Binns*.]

1840.

First Sitting at Westminster in Michaelmas Term, 1840.

BEFORE MR. JUSTICE PATTESON.

BURLING *v.* PATERSON.

Goods were taken under a fi. fa. as the goods of Sophia W., and on an issue directed to try whether the goods were the property of J. B., it was proved that the goods, prior to 1836, belonged to Martin W. when they were distrained for rent, and the sum for which they were distrained paid in the name of Sophia W. with the money of the plaintiff. In 1837, Martin W. became bankrupt, and the plaintiff paid £128 to the official assignee for Martin W.'s interest in the goods. Early in 1839 Martin W. took the benefit of the Insolvent Debtors' Act, but his assignee never claimed the goods. In November, 1839, Sophia W. executed an assignment of the goods to the plaintiff, and in March, 1840, the goods were seized under a fi. fa. against Sophia W. The goods always had remained in the possession of Martin W. as the ostensible owner of them, and Sophia W. never was in possession of them:—*Held*, that on these facts J. B. had made out his property in the goods, and that as Sophia W. had never been in the possession of the goods, and never could have gained false credit by them, there was nothing from which the jury ought to infer that the assignment was fraudulent.

Held, also, that the fact, that the assignment was kept at Martin W.'s house was immaterial, and that it was also immaterial that no possession of the goods had been delivered by Sophia W. to the plaintiff, as the right to them would pass by the execution of the deed.

Where the attestation of a deed is in the usual form, and the attesting witness recollects seeing the party sign the deed, but does not recollect any other form being gone through, it will be for the jury to say on this evidence, whether the deed was not duly signed, sealed, and delivered, as all that is very likely to have occurred, though the witness did not remember it.

ISSUE directed by the Court of Queen's Bench to try whether certain goods were on the 2nd of March, 1840, the property of James Burling.

It appeared that the goods in question had been seized by the sheriff of Middlesex, under a writ of fieri facias, which had been sued out against Sophia Wray, and it was proved that the goods in question had originally, and before the year 1836, belonged to a person named Martin Wray, who kept a shop in Holborn for the sale of medicines, at which place the goods were seized. It was also proved, that, in the year 1836 the goods were distrained on for rent due from Martin Wray, and that the amount of the distress was paid in the name of Sophia Wray, and, as was proved by Martin Wray, with the money of the plaintiff. It further appeared that Martin Wray had become bankrupt in the year 1837, and that after his bankruptcy the plaintiff had purchased the assignee's interest in the goods, and paid the official assignee

£128, and that early in the year 1839 Martin Wray took the benefit of the Insolvent Debtors' Act. It did not appear that the assignee under that insolvency ever claimed the goods, although Martin Wray continued to be the ostensible owner of them at the time of his insolvency and also down to the 2nd of March, 1840. On the part of the plaintiff a deed of assignment dated on the 20th of November, 1839, between Sophia Wray of the one part and the plaintiff of the other part, was given in evidence, by which, in consideration of 248*l.* 13*s.*, Sophia Wray assigned the goods mentioned in a schedule to that deed (the goods in question) to the plaintiff. The attestation of the deed was in the usual form, but the attesting witness (a female servant of Martin Wray) could only recollect seeing Sophia Wray sign the deed, and could not recollect whether any other form was observed, and this witness also could not recollect when it was that she saw the deed signed, any further than that it was about ten months before the trial (*a*). There was no evidence to shew that Sophia Wray had ever been in possession of any part of the goods, Martin Wray always appearing as the ostensible owner. It was also proved that the deed of the 20th of November was kept in a cupboard at the house of Martin Wray, in which the goods were seized by the sheriff on the 2nd of March, 1840.

Platt, for the defendant, addressed the jury, and contended that the goods never were the property of the plaintiff, and that the bill of sale, which was not distinctly proved to have been executed before the 2nd of March, 1840, was fraudulent.

PATTESON, J., (in summing up).—The question is, whether these goods on the 2nd of March, 1840, were the property of the plaintiff, the goods having been on that day

(*a*) In cases where the precise time of the execution of a deed is important, it might be often convenient for the date of the execution of the deed to be inserted in the attestation, and for the attesting witness to insert the date in his own handwriting.

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seized by the sheriff of Middlesex, as being the goods of Sophia Wray; however, if they were neither the property of the plaintiff nor of Sophia Wray, the plaintiff will not be entitled to recover on this issue. The case on the part of the plaintiff is, that the property in these goods passed to him by the deed of the 20th of November, and the plaintiff asserts that there was no fraud or false credit in Sophia Wray, as Martin Wray always appeared as the owner of the goods. As regards the creditors of Martin Wray the plaintiff could not perhaps hold these goods as against them; but as they do not claim the goods, and the execution in the present case was for a debt due from Sophia Wray and not for a debt due from Martin Wray, the possession of Martin Wray appears to me to be immaterial, though it is singular that the assignees under Martin Wray's insolvency should never have claimed the goods. Then, as to the bill of sale, if Sophia Wray really executed the bill of sale before the 2nd of March, 1840, she transferred the goods to the plaintiff, and the property in them was passed by it. There is no evidence that Sophia Wray was ever in the ostensible possession of these goods, or ever gained any false credit by them, the possession of them having always been in Martin Wray. Then, did Sophia Wray sign, seal, and deliver the deed? The witness recollects her signing it, which is the least material part (*a*); however,

(*a*) Very ancient deeds were never signed; and before the Statute of Frauds (29 Car. 2, c. 3), it is quite clear that even conveyances of land did not require a signature, and were rendered valid by the seal only, and in the case of *Lemayne* v. *Stanley*, 3 Lev. 1, *North*, C. J. and *Wyndham* and *Charlton*, Js. were of opinion that the testator putting his seal to a will, was *signing* within the Statute of Frauds, but *Levinz*, J. doubted, and in the case of *Warneford* v. *Warneford*, 2 Str. 764, Lord *Raymond* held at Nisi Prius that "*sealing* a will is a *signing* within the Statute of Frauds and Perjuries." Royal charters have at this day no signature; the warrant under the Royal sign manual, on which each of them is made out, standing in much the same relation to the charter itself as the agreement for the sale of an estate does to the deed of conveyance. Many of us have no doubt seen pictorial representations of King John *signing* Magna Charta without recollecting that they are founded on error. Magna Charta

you will say whether this evidence satisfies you that Sophia Wray authenticated the seal, either by touching it or the like, and also whether she delivered the deed, all which is very likely to have occurred, though the witness does not remember it. If this deed was executed by Sophia Wray upon the 2nd of March, I see nothing to impeach it, as, if executed by Sophia Wray, it would pass the property, unless there was some fraud; and as the goods were never left with Sophia Wray, and as no false credit was given to her by the possession of them, I think that there is nothing from which you can infer fraud. If the whole matter was fraud from beginning to end, the case would be different; but we find that the distress was paid out in the name of Sophia Wray, but with the money of the plaintiff, and that the plaintiff also paid £128 to the official assignee. It therefore appears to me that there is no pretence for saying that there was fraud. It is proved that the plaintiff had not the possession of the deed, and that it was kept at Martin Wray's; but I think that that is not material.

was *sealed* but was not *signed*, and even the articles for that charter entered into between the Barons and King John, commencing "Ista sunt capitula que Barones petunt et Dominus Rex concedit" (now remaining in the British Museum), are under *seal* but not *signed*, and it seems to be a matter of some doubt whether King John could write, as no Royal autograph of any English monarch is known to be in existence earlier than that of Richard the Second, whose reign commenced 161 years after the death of King John, and since that time the series of Royal autographs is complete. The charter of the foundation of Battle Abbey by William the Conqueror, which is in the British Museum, (Harl. Char. 83, A. xii.), has evidently had a seal attached to it, which has been lost, but it has now at the foot of it the *mark* of William the Conqueror, the marks of the two archbishops, of four bishops, and of six of the temporal nobility. The cross of each has the name written against it thus, "Wille+lmus Rex; Lanfr+ancus arch. Cant.; Tomas+archiep. Ebor.," &c., but the names are manifestly not signatures. This charter is in a very plain and good handwriting, and is in perfect preservation. The leases of colleges and other corporations aggregate are always under their common seal, without any signature at all being affixed to them.

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There is also no evidence of any delivery of possession of the goods to the plaintiff, as by giving a chair in the name of the whole, or the like: however, that is not necessary, though sometimes done, as the property in the goods would pass by the mere execution of the deed. If this deed was executed by Sophia Wray upon the 2nd of March, 1840, it appears to me that the plaintiff has made out his case.

Verdict for the defendant (*a*).

Byles, for the plaintiff.

Platt, for the defendant.

[Attornies—*S. Smith* and *Paterson*.]

ON a subsequent day, *Byles* applied to the Court for a new trial, on affidavits, and also on the ground that the verdict was against evidence; and the Court granted a rule to shew cause.

(*a*) See the case of *Riches* v. *Evans, Esq.*, Post.

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Second Sittings at Westminster in Michaelmas Term, 1840.

BEFORE MR. JUSTICE PATTESON.

MASON *v.* NEWLAND and ROSIER.

TROVER for a mare.—Pleas by the defendant Newland: 1st, Not guilty; 2nd, that the defendant Newland was keeper of a common pound, and that the defendant Rosier had taken the mare in a close of his doing damage, and had delivered her to this defendant to be impounded, and that he did impound the mare for the cause aforesaid. Pleas by the defendant Rosier: 1st, Not guilty, "by statute;" and, 2nd, that he took the mare damage feasant,

A mare was distrained, damage feasant, by A., and detained in the pound by the pound-keeper B. for several days. B. supplied the mare with food while in the pound, and A. & B. joined in selling the mare for the keep:—*Held*, in an action of trover by the owner of the mare against A. & B., that if they bonâ fide and honestly *intended* to sell the mare under the provisions of the stat. 5 & 6 Will. 4, c. 59, s. 4, (the cruelty to animals' act), they were entitled to notice of action, and to have the venue laid in the proper county; but on these facts the Judge would not nonsuit, but left it to the jury to say whether the defendants meant bonâ fide to act upon the provisions of that statute, and that if they did the defendants were entitled to their verdict.

If a defendant plead not guilty "by statute" to the declaration, that plea also extends to a new assignment.

If a defendant does not add the words by "statute" on the margin of his plea of not guilty, he cannot give special matter in evidence to bring himself within an act of Parliament, which allows a plea of not guilty; but if at the end of the plaintiff's case it appear that the defendant was entitled to notice of action, and to have the venue laid in the proper county, and the plaintiff gave no notice of action, and the venue be in a wrong county, this is is not aided by the defendant having omitted to add the words "by statute" on the margin of his plea.

Semble, that under the 4th section of the stat. 5 & 6 Will. 4, c. 59, the person who is bound to supply food to impounded cattle is the distrainer or person at whose suit they are impounded, and not the pound-keeper; but if the pound-keeper supplies the food at the request of the distrainer, or the distrainer joins with the pound-keeper in a subsequent sale of the cattle under this act, the pound-keeper and the distrainer are for this purpose to be considered as one.

Semble, that the 4th section of this statute excludes any right in the owner of the cattle to supply them with food while in the pound. Under the provisions of this statute the distrainer who supplies the food, may either apply to a magistrate to allow any sum not exceeding double the value of the food, or may sell the cattle; but no magistrate ought to allow more than the actual value of the food, if the owner of the cattle was willing to supply the food himself.

If cattle be sold under this provision of the stat. 5 & 6 Will. 4, c. 59, the distrainer can only get the single value of the food and not the amount of the damage for which the cattle were distrained, as all the overplus beyond the value of the food, and the expenses of the sale, is to be returned to the owner of the cattle.

The 5th section of the stat. 5 & 6 Will. 4, c. 59, does not give any person a right to any payment, it merely allows charitable persons to supply food to impounded cattle without being liable to an action for doing so.

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and caused her to be impounded (*a*). New assignment to the second plea of the defendant Newland, that

(*a*) As the forms of the defendants' special pleas may be useful in practice, we have subjoined them:—

"And for a further plea in this behalf, the defendant A. N. says, that before and at the time when &c. he, the defendant A. N., was and still is the keeper of a common and open pound, situate in the parish of M., in the county of S., to wit, the pound of the manor of V. there, and the defendant T. R., just before the said time when &c., to wit, on the day and year aforesaid, had taken and detained the said cattle in the declaration mentioned, in a close of him, the said defendant T. R., situate in the parish, county, and manor aforesaid, doing damage there to the defendant T. R., and had then delivered the same to the defendant A. N., as keeper of the said pound, to be impounded in the said pound. And the defendant A. N., as keeper of the said pound, then and just before the said time when &c., took and received the said cattle of and from the defendant T. R., for the purpose aforesaid, and then, at the request of the defendant T. R., impounded the same as such distress as aforesaid in the said pound, and then, as keeper of the said pound, and at the request of the said defendant T. R., kept and detained the same from the plaintiff until and at the said time when &c., so impounded as such distress as aforesaid in the said pound, and at the said time when &c., refused to deliver the same to the plaintiff, the same being detained by him the defendant A. N., as keeper of the said pound as aforesaid, for and at the request of the defendant T. R., as he the defendant A. N. might for the cause aforesaid, which is the same supposed conversion in the declaration mentioned, and whereof the plaintiff hath above complained; and this the defendant A. N. is ready to verify, &c."

(Signed), JAMES WATSON.

"And for a further plea to the grievances in the declaration mentioned, so far as they relate to the said mare therein mentioned, the defendant T. R. says, that he the defendant T. R., before and at the said time when &c., was lawfully possessed of a certain close with the appurtenances, called the Wildford-lane Field, situate at M., in the county of S., and because the said mare before and at the said time when &c., was wrongfully in the said close of the said defendant T. R., eating and depasturing the grass and herbage of the defendant T. R. there then growing, and doing damage to the defendant T. R., he the defendant T. R. seized and took the said mare in the said close so doing damage thereon as aforesaid, as a distress for the said damage, and led the said mare out of the said close to the common pound in M. aforesaid, and there impounded, and kept impounded the same as it was lawful for the defendant T. R. to do for the cause aforesaid, which are the same grievances in the declaration mentioned, so far as they relate to the said mare therein mentioned; and this the defendant T. R. is ready to verify &c."

(Signed), H. H. PYKE.

the plaintiff commenced his action for that this defendant on other and different occasion, and for a different purpose, took and converted the mare to his own use: there was also a similar new assignment to the 2nd plea of the defendant Rosier.

It appeared that the plaintiff's mare had been turned out on Mitcham Common on the 26th of June, 1840, and that the mare had on that night got into the field of the defendant Rosier, who had sent her to the other defendant, who was the pound-keeper, to be impounded; and that the mare was kept in the pound for several days, and fed by the defendant Newland. It further appeared, that the plaintiff offered 2*s.* 6*d.* for the damage, and 2*d.* for the impounding, but that the defendant Newland said that he was to receive 10*s.* for the damage, and would not deliver up the mare. It also appeared that printed hand-bills were posted up, for more than three days, announcing that the mare would be sold at Croydon market for its keep on the 10th of July, and that it was sold accordingly for 4*l.* 10*s.*, the defendant Rosier being present. It was also proved that the mare was worth £7 or £8.

E. James, for the defendant Newland.—I submit that the defendant Newland was entitled to notice of action. The defendant Newland acted as the pound-keeper, and he supplied food to the mare while in the pound, and he was therefore justified in selling her under the stat. 5 & 6 Will. 4, c. 59, s. 4 (*a*), which is an act for preventing cruelty to

(*a*) By which, after reciting that 'Whereas great cruelties are practised by reason of keeping and detaining horses, asses, and other cattle and animals impounded and confined without food, frequently formany days,' for remedy whereof it is enacted, "That from and after the passing of this act, every person who shall impound or confine, or cause to be impounded or confined, any horse, ass, or other cattle or animal, in any common pound, open pound, or close pound, or in any inclosed place, shall, and he is hereby required to find, provide, and supply such horse, ass, and other cattle or animal so impounded or confined daily, with good and sufficient food and nourishment, for so long a time as such horse, ass, or other cattle or animal

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animals; and by sect. 19 of that act, it is enacted, "that all actions and prosecutions which may be brought or commenced against any person for anything done in pursuance or under the authority of this act, shall be commenced within one calendar month next after the fact committed, and not afterwards, and shall be brought and tried in the county or place where the cause of action shall arise, and not elsewhere, and notice in writing of any such action, and specifying the cause thereof, shall be given to the defendant fourteen clear days at least before the commencement of any such action; and the defendant in such action may plead the general issue, and give this act and any other matter or thing in evidence at any trial to be had thereupon: and if the cause of action shall appear to arise from or in respect of any matter or thing done in pursuance and by the authority of this act, or if any such action shall be brought after the expiration of one calendar

shall remain and continue so impounded or confined as aforesaid; and every such person who shall so find, provide, and supply any such horse, ass, or other cattle or animal with such daily food and nourishment as aforesaid, shall and may, and he and they are hereby authorized and empowered to recover of and from the owner or owners of such cattle or animal not exceeding double the full value of the food and nourishment so supplied to such cattle or animal as aforesaid, by proceeding before any one justice of the peace, within whose jurisdiction such cattle or animal shall have been so impounded and supplied with food as aforesaid, in like manner as any penalty or forfeiture or any damage or injury may be recovered under and by virtue of any of the powers or authorities in this act contained, and which value of the food and nourishment so to be supplied as aforesaid, such justice is hereby fully authorized and empowered to ascertain, determine, and enforce as aforesaid, and every person who shall have so supplied such food and nourishment as aforesaid, shall be at liberty if he shall so think fit, instead of proceeding for the recovery of the value thereof as last aforesaid, after the expiration of seven clear days from the time of impounding the same, to sell any such horse, ass or other cattle or animal, openly at any public market (after having given three days' public printed notice thereof) for the most money that can be then got for the same, and to apply the produce in discharge of the value of such food and nourishment so supplied as aforesaid, and the expenses of and attending such sale, rendering the overplus (if any) to the owner of such cattle or animal.'"

month, or shall be brought in any other county or place than as aforesaid; or if notice of such action shall not have been given in manner aforesaid, or if tender of sufficient amends shall have been made before such action commenced, or if a sufficient sum of money shall have been paid into Court after such action commenced, by or on behalf of the defendant, the jury shall find a verdict for the defendant:" and this action, if brought at all, ought to have been brought in Surrey instead of Middlesex.

Montagu Chambers, for the defendant Rosier.—The defendant Rosier was entitled to have notice of action, and the venue in the proper county. The action is not for the taking or putting in the pound, but is for the subsequent sale. It is shown that the animal was fed in the pound, and the sale either was, or was evidently intended to be, in strict compliance with the provisions of the 4th section of the stat. 5 & 6 Will. 4, c. 56.

PATTESON, J.—The enactments as to the supply of food under the 4th section do not appear to me to be intended to apply to the pound-keeper. It seems to me that the person who, under those enactments, is bound to supply the animal with food, is the person at whose suit (if I may use the expression) the animal is put in the pound.

Montagu Chambers.—There is also no conversion proved against the defendant Rosier, except the putting in the pound.

PATTESON, J.—The 5th section of the statute 5 & 6 Will. 4, c. 56, does not give any person a right to any payment; it merely allows charitable persons to supply food to impounded cattle, without being liable to an action for doing so. I cannot nonsuit the plaintiff; because the 19th section of the act says, that if there is no notice of action, or the venue is not in the proper county, the verdict shall be for the defendant. I think that the selling of the mare was a

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conversion distinct from the taking, but I think also that that was intended to be a sale under the 4th section of the statute 5 & 6 Will. 4, c. 59; and it therefore appears to me that the defendants are within the protection of the 19th section, if they acted bonâ fide; and the question whether they acted bonâ fide or not, is the question that I must leave to the jury.

E. James, addressed the jury for the defendant Newland. A pound-keeper is not the person to determine whether cattle shall be impounded or not; he must impound if the cattle are brought to him. In the case of *Brandling* v. *Kent* (*a*), Mr. Justice *Buller* says, "It has been decided in the case of a pound-keeper that he is bound to receive every thing offered to his custody, and is not answerable whether the thing were legally impounded or not." And if the defendant Newland had discharged the animal for the 2*s*. 6*d*. offered, the other defendant might have sued him for the difference. The question is, whether the defendant Newland acted bonâ fide? He fed the animal, and believed he had a right to sell it for its keep.

PATTESON, J.—I doubt whether the pound-keeper is bound to feed an animal in the pound; but if he does it by

(*a*) 1 T. R. 60. In the case of *Badkin* v. *Powell*, Cowp. 476, Lord Mansfield, C. J., said, "The pound-keeper is bound to take and keep whatever is brought to him at the peril of the person who brings it. There is no judgment, no direction, no written warrant or examination to be had by him." "He only takes the cattle as he is obliged to do, at the peril of the persons who bring them. If wrongfully taken, they are answerable, not *he*. It would be terrible if a pound-keeper were liable to an action for refusing to take cattle in, and were also liable in another action for not letting them go. If he goes one jot beyond his duty, and assents to the trespass, that may be a different case." "When cattle are once impounded he cannot let them go without a replevin, or without the consent of the party. Upon their being released, he is entitled to legal fees. If he is guilty of extortion, there is another remedy." See the case of *Rex* v. *Brudshaw*, ante, Vol. 7, p. 233.

the direction of, and in conjunction with the person who caused the cattle to be impounded, they are then to be considered as one.

Montagu Chambers, addressed the jury for the defendant Rosier, and contended that the defendant Rosier had acted bonâ fide.

Charnock, for the plaintiff.—The plea of not guilty, which was pleaded by the defendant Newland to the declaration, is not a plea "by statute" (*a*), neither is his plea of not guilty to the new assignment. The plea of the defendant Rosier to the new assignment is also not "by statute," and it is on that plea that the present trial proceeds.

Chambers.—This objection cannot apply to the want of notice of action; and with respect to the defendant Rosier, his plea to the declaration is "by statute."

PATTESON, J.—With respect to the defendant Rosier, there is certainly nothing in the objection. His plea of not guilty to the declaration is "by statute;" and it was held in the case of *House* v. *The Thames Commissioners* (*b*), that the plea of the general issue to the declaration goes also to the new assignment, even though there was judgment by default on the new assignment.

Chadwicke Jones, for the plaintiff.—Does not your Lordship think that the new assignment gives the go-by to the former pleas?

(*a*) By the rule of T. T. 1 Vict. "It is ordered, that in every case in which a defendant shall plead the general issue, intending to give the special matter in evidence by virtue of any act of Parliament, he shall insert in the margin of such plea 'By statute,' otherwise such plea shall be taken not to have been pleaded by virtue of any act of Parliament, and such memorandum shall be inserted in the margin of the issue and the nisi prius record."

(*b*) 6 Moore, 324.

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PATTESON, J.—No; only to the justification. You join issue on the general issue by saying, "and the plaintiff doth the like."

Chadwicke Jones.—The defendant Newland does not refer to any statute on the margin of any of his pleas.

PATTESON, J.—I think it is quite clear that for want of the marginal reference the defendant Newland could not have gone into evidence to bring himself within the act of parliament. The rule only is that he shall not give special matter in evidence. The defendant Newland has given no evidence, and he has not proposed to give any. But this is a failure on the plaintiff's case; because, as it appears that this was a case within the act of Parliament, the plaintiff was bound to give some evidence to show that he had given notice of action, and had laid the venue in the proper county.

Chadwicke Jones.—That being your Lordship's opinion, I can only ask your Lordship to leave it to the jury on the bona fides (*a*).

PATTESON, J., (in summing up).—The only question is, whether these defendants sold this mare bonâ fide, to reimburse themselves for its keep while it was in the pound; for if in selling this mare they were intending to proceed on the provisions of this act of Parliament, the plaintiff

(*a*) In the case of *Wedge* v. *Berkeley*, 6 Ad. & E. 663, it was held, that under the stat. 24 Geo. 2, c. 44, s. 1, a magistrate sued for detaining goods on a suspicion of felony, is entitled to notice of action, if he proceeded under a bonâ fide belief that he was executing his duty, although it be proved that he has no reasonable ground of suspicion, and the bonâ fides, as well as the reasonableness of the suspicion, is a question for the jury; and if the plaintiff seeks to maintain his action without having given notice, it lies on him to cause the question of bonâ fides to be put to the jury. See also the case of *Reed* v. *Cowmeadow*, ante, Vol. 7, p. 821.

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should have given notice of action, and laid his venue in Surrey. It is not essential that the defendants should have precisely, and in every respect pursued the enactments of the statute; it is sufficient if they intended to proceed actually and honestly on its provisions; and if they did, you, as a jury of the county of Middlesex, have no jurisdiction. It is not necessary here to consider whether the pound-keeper is the person bound to supply food to impounded cattle—I rather think that he is not, and that the person who causes them to be impounded is the person who is bound to supply them with food; but if the pound-keeper supplies them with food, and the distrainor joins in selling them for their keep, the distrainor and the pound-keeper are for this purpose to be considered as one. The 4th section seems to exclude any right in the owner of the cattle to procure food for them while in the pound; but it also does not absolutely give the distrainor double the value of the food supplied by him, but only empowers a justice of the peace to allow a sum not exceeding double the value; and I am quite sure that no justice would allow more than the actual value of the food if the owner of the cattle was willing to supply it himself. The distrainor may either go before a justice to have a sum allowed, or he may sell; but if the distrainor sells he can only get the single value of the food, and not the amount of the damage for which the cattle are distrained, as he is to return to the owner of the cattle all the overplus beyond the value of the food and the expenses of the sale;—a strange provision, but so it is. Here the defendants chose the latter alternative, and have sold; and the question is, whether they bonâ fide intended to sell under this act of Parliament. If they acted honestly, though perhaps mistakenly, they are entitled to a verdict; but if you think that they did not act bonâ fide, and that the sale was all a pretence to injure the plaintiff, then the plaintiff is entitled to your verdict.

Verdict for the plaintiff—Damages £7.

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Chadwicke Jones, and *Charnock*, for the plaintiff.

E. James, for the defendant Newland.

Montagu Chambers, for the defendant Rosier.

[Attornies—*Philp* for the plaintiff; *Waterman* for the defendant Newland; and *Elderton* for the defendant Rosier.]

ON a subsequent day a new trial was applied for by *Montagu Chambers;* on the ground that the question of intention or of *bona fides* did not arise, inasmuch as all the requisites of the statute to justify a sale of the mare had been proved to have been complied with on the part of the defendant Rosier; and by *E. James*, for the reasons urged at the trial: but the Court refused a rule, as the damages were under £20.

Sittings at Westminster after Michaelmas Term, 1840.

BEFORE MR. JUSTICE COLERIDGE.

Dec. 7th.

In an action for a libel which imputed that the plaintiff's house was opened as a gaming-house, under the leadership of a woman of notorious character. The plaintiff alleged in his declaration that his house was a club-house, and that divers persons paid annual subscriptions. The payment of subscriptions was denied by one of the defendant's pleas, and evidence was given that a book was kept for subscribers' names, and that two gentlemen wrote their names in this book; but no evidence was given of the payment of any subscription:—*Held*, that there was evidence to go to the jury in support of the allegation in the declaration.

The defendant pleaded several pleas, but none of them at all referring to the plaintiff's wife:—*Held*, that the plaintiff could not go into evidence to shew that his wife was a respectable person, as on these pleadings she must be taken to be so:—*Held*, also, that the plaintiff could not go into evidence to shew that his wife had become ill, and died soon after the publication of the libels.

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LIBEL.—The declaration stated, that before and at the time of the committing of the grievances, the plaintiff, together with his wife and family, was the occupier and possessor of a certain house known by the name or sign of the Cocoa Tree, for the purpose of opening the same as a club-house, and carrying on the business of a club-house, tavern and coffee-house keeper, and had opened the same as

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a club-house, and carried on the said business there; and that divers persons had paid divers annual sums for the privilege of using and frequenting the said house; and that the defendant, in a certain newspaper called the Satirist, on the 22nd of March, 1840, published a libel on the plaintiff. This libel imputed that the Cocoa Tree in St. James's Street "was opened by a party of play-table sharpers, under the recognised leadership of a woman of notorious character." The 2nd count stated another libel, in the Satirist of the 29th of March. This libel contained imputations that the house was a gaming-house, at which persons were defrauded of their money. The 3rd count stated a third libel, contained in the Satirist of the 5th of April, which, after making similar imputations, stated that a sporting Earl, who had been plundered of some money there, went with some friends, and took away a case of fraudulent dice; and it then went on to state, that "the keeper of the den, a notorious woman, who formerly kept a house of ill fame at Pimlico, and subsequently lived in Panton Square, and recently in Bolton Row, being discovered by the party, they removed the brick-dust from her cheeks, substituting layers of black lead, in order, as they said, that she might, in colour at least, be a correct representation of her foster-father, his satanic majesty." The declaration also stated special damage, but of this no evidence was given. Pleas—1st, not guilty; 2nd, as to so much of the declaration as related to the plaintiff's opening the house as a club-house, and carrying on the business as a tavern and coffee-house keeper—a plea, denying that the plaintiff did so; 3rd, as to the allegation that persons paid annual sums for the privilege of using the house as a club-house—a plea, denying that they had done so; 4th, to a part of the first count—a plea, stating in substance that the plaintiff and a person named Smart, and a woman of notorious character, named Harrison, kept the house called the Cocoa Tree as a common gaming-house;

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5th, as to part of the libel in the second count, that the plaintiff had knowingly suffered loaded dice to be used in the house, whereby persons were defrauded by the plaintiff; 6th, to the whole of the first count, that the plaintiff kept a common gaming-house; 7th and 8th, the like as to the whole of the second and third counts. These three latter pleas were in the usual form of an indictment for keeping a common gaming-house. Replication as to those pleas which concluded to the country, a similiter, and as to the other pleas, de injuria.

It was opened by *Thesiger* for the plaintiff, that the plaintiff had taken the house known as the Cocoa Tree club-house, in St. James's Street, intending to open it as a club-house, and that several gentlemen had become subscribers to it; and that soon after the publication of these libels the plaintiff's wife had become ill, and died.

The publication of the libels by the defendant was proved; and to prove the introductory allegations of the declaration, two of the plaintiff's servants were called, who proved that the house had been fitted-up as a club-house; and one of them proved that a book was kept for subscribers to insert their names, in which book he had seen Count d'Orsay and Colonel Bentinck put their signatures; but there was no evidence of any subscription having been actually paid.

Thesiger, for the plaintiff, proposed to ask one of the witnesses as to the state of health of the plaintiff's wife just after these libels were published.

Chadwicke Jones, for the defendant.—I submit that any thing that has occurred to Mrs. Guy cannot be evidence in this cause.

COLERIDGE, J.—How is it relevant to any of these issues? The plaintiff could not in this action recover damages either for the sufferings of his wife, or for the

loss occasioned by her death. It does not seem to me to be relevant to the inquiry.

Thesiger.—I submit that it is evidence, as shewing the general nature and character of these libels. They refer in direct terms to the plaintiff's wife; and we may therefore be allowed to give general evidence of the effect the libels had on her.

COLERIDGE, J.—If you had stated her illness on the record, you could not have gone into evidence of it; and I think you cannot do so the more, as you have not stated it.

Thesiger.—As the libels assail the plaintiff's wife, may I shew that she is a respectable person?

COLERIDGE, J.—I think that she must be taken to be so.

The evidence was rejected.

Chadwicke Jones objected that there was no evidence on the third issue, that any one had paid any subscription.

COLERIDGE, J.—I think there is evidence to go to the jury.

Chadwicke Jones, for the defendant, addressed the jury on that point, and also in mitigation of damages.

COLERIDGE, J., left it to the jury to say whether, on the evidence, they were satisfied that subscriptions had been paid, or whether they thought, by putting their names in the book, the gentlemen who had been mentioned merely meant to intimate that they were willing to become subscribers.

Verdict for the plaintiff on all but the third issue, with £100 damages; and on the third issue, for the defendant.

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Thesiger and *Hoggins*, for the plaintiff.

Chadwicke Jones, and *Wingrove Cooke*, for the defendant.

[Attornies—*Nias* and *Hodgson & B.*]

READ *v.* DUNSMORE.

Dec. 7th.

The plaintiff, a journeyman carpenter, sued his master on the custom of the trade, by which the master, when the journeyman is sent to work in the country, has to pay the coach-fare of the man back to London, and also the back-carriage of his tools. It appeared that this custom did not apply where the man, while in the country, was dismissed for misconduct, or dismissed himself. The declaration was founded on a supposed general custom without these exceptions; but the Judge at Nisi Prius allowed the declaration to be amended by inserting these exceptions, and adding averments that the plaintiff was not dismissed for cause, and did not dismiss himself, the plaintiff paying the costs occasioned by this amendment.

ASSUMPSIT.—The first count of the declaration stated "that before and at the time of the plaintiff entering into the service and employ of the defendant, and of the making of the promise of the defendant as hereinafter next mentioned, the defendant exercised and carried on the trade and business of a carpenter in London, and thereupon heretofore to wit, on the 1st day of September, A. D. 1839, in consideration that the plaintiff at the defendant's request had entered into the service and employ of the defendant, in his said trade and business in a certain capacity, to wit, as a journeyman carpenter, upon and subject to certain terms and conditions, that is to say, that the defendant should pay the plaintiff for his expenses by him incurred in travelling, and in carrying and conveying his tools of trade from London to any place in the country to which the defendant should order the plaintiff to go, and to which the plaintiff should accordingly go in the course of his said service, and employ to do and perform work for the defendant with those tools, and also pay the plaintiff for his expenses by him incurred in travelling and in carrying and conveying his said tools back again from that place to London aforesaid, he, the defendant, then pro-

If a master carpenter sends his men from London to work at a gentleman's house in the country, he may dismiss them for improper conduct, although it does not amount to either moral misconduct, wilful disobedience, or habitual neglect; and where, in such a case, a journeyman was found in one of the preserves of the gentleman at whose house the work was done, after a caution had been given to him to keep the paths, and upon complaint by the gentleman, the master dismissed the journeyman, the Judge left it to the jury to say whether the master was not justified in such dismissal.

mised the plaintiff that he would perform and fulfil those terms and conditions; and the plaintiff avers that he, confiding in the said promise of the defendant, did continue in the said service and employ on the terms and conditions aforesaid for a long time, to wit, until the 15th of June, 1839, and that, in the course of the said service and employ, and whilst the plaintiff was therein, to wit, on the 28th of May, 1839, the defendant ordered the plaintiff to go to a certain place in the country, to wit, to Staunton in Wiltshire, to do and perform work for the defendant with the plaintiff's tools of trade, and the plaintiff then accordingly did go and travel from London aforesaid to that place, and cause and procure his tools of trade to be carried and conveyed thereto, to do and perform the said work for the defendant; and did afterwards, to wit, on the day and year aforesaid, go and travel, and cause to be carried and conveyed his said tools back again from that place to London aforesaid; And the plaintiff avers that he, the plaintiff, did incur and pay divers expenses, amounting to wit, to £10, in and about this said travelling, and causing to be carried and conveyed his said tools back again from the said place in the country to London aforesaid, whereof the defendant afterwards and before the commencement of this suit, to wit, on the day and year last aforesaid had notice, and was then requested by the plaintiff to pay him the same; yet the defendant, not regarding his said promise, hath not yet paid the plaintiff the said sum of £10, or any part thereof; and the same remains wholly due and unpaid to the plaintiff."

There were also counts for work and labour, and upon an account stated. Pleas—1st, non-assumpsit; 2nd, as to so much of the first count as related to the plaintiff's going from London to the place mentioned, and conveying his tools thither—a plea, that he did not incur or pay any money in respect of the causes of action in the introductory part of this plea mentioned (concluding to the country); 3rd, as to the causes of action in the intro-

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ductory part of the 2nd plea mentioned—a plea of pay ment; 4th, as to the expenses incurred by the plaintiff i returning to London and bringing back his tools—tha the plaintiff, at the time of making the promise in th first count mentioned, and in consideration of the pre mises, promised to conduct himself honestly, justly, an with due propriety and decorum during the period of hi service, and that he did not do so; wherefore the defendan dismissed and discharged him: and that these expense were incurred after such dismissal and discharge (*a*). Re

(*a*) As the form of the plea may be useful in practice we have subjoined it:—"And for a further plea in this behalf, as to so much of the first count of the said declaration as relates to the expenses alleged to have been incurred and paid by the said plaintiff in the said plaintiff's going and travelling from and causing to be carried and conveyed, his said tools back again, from the said place in that count mentioned to London aforesaid, the said defendant says, that, heretofore and at the time of the making of the said promise by the said defendant, as in the said first count mentioned, the said plaintiff in consideration of the premises therein mentioned in that behalf, promised the said defendant to conduct himself honestly, justly, and with due propriety and decorum, during the period of the said service and employ in the said first count mentioned, and to use due care, well, diligently, and faithfully to serve the said defendant in such service and employ as aforesaid, and he the said defendant then retained and employed the said plaintiff as in the said first count mentioned, upon the faith and in consideration of the said promise s made by the said plaintiff as afore said, and the said defendant fur ther saith, that he was always ready and willing to continue, retain, an employ the said plaintiff in the sai capacity and upon the terms in th said first count mentioned until h dismissed the said plaintiff as here inafter mentioned; and the sai defendant further saith that th said plaintiff did not, nor would whilst he continued in the sai service and employ of the said de fendant, as in the first count men tioned, conduct himself honestly justly, and with due propriety an decorum during the period of th said service and employ in the sai first count mentioned; nor did no would he the said plaintiff, use du care, well, diligently, and faithfully to serve the said defendant in suc service and employ as aforesaid but, on the contrary thereof, h the said plaintiff, from time t time after he entered such servic and employ, and before and unti he was discharged as hereinafte mentioned, wrongfully, carelessly obstinately, and improperly neg lected and refused to conduc himself honestly, justly, and wit

plication to the 3rd plea, a denial of the payment; and to the 4th plea, de injuriâ.

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It was opened by *Cockburn*, for the plaintiff, that the plaintiff was a journeyman carpenter, and the defendant a master carpenter and builder, and that the present claim was founded on the custom of the trade, that, where a journeyman carpenter was sent into the country to work, the master was to be at the expense of conveying the journeyman and his tools to the place at which the work was to be done and back again to London. In the present case, the plaintiff had been sent by the defendant to work at Staunton House, near Highworth, in Wiltshire, and had paid the expenses of conveying him and his tools thither; but having while there dismissed the plaintiff from his service, the defendant refused to pay the expenses of the plaintiff's returning to town, and also the expenses of the carriage of his tools from Staunton House to London, amounting to 1*l.* 7*s.*

Evidence was given, that, in the month of March, 1839,

due propriety and decorum, during the period of the said service and employ in the said first count mentioned; and he the said plaintiff greatly misconducted himself in such service and employ as aforesaid, and thereby he the said defendant was greatly injured, in respect of divers matters and business, in which he employed the said plaintiff in his said service and employ as aforesaid; and by reason of the said several premises it became and was necessary and expedient for the due conduct and management of the said defendant's business, that the said defendant should discharge and dismiss the said plaintiff from his said service and employ; wherefore the said defendant afterwards, to wit, on the 15th day of the said month of June, did refuse to suffer or permit the said plaintiff to continue or abide any longer in his the said defendant's service and employ as such servant in the first count mentioned, and did discharge and dismiss him therefrom as he the said defendant lawfully might for the cause aforesaid; and the said defendant, in fact, further saith that the said several expenses, in the introductory part of this plea mentioned, were incurred by the said plaintiff after such dismissal and discharge by the said defendant as in the said first count mentioned, and this he the said defendant is ready to verify, &c."

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the plaintiff was sent down to work at Staunton House by the defendant, and that while there he was dismissed; and that his coach-fare back to London was £1, and the carriage of his tools 7*s.*; and several witnesses stated the custom of the trade to be, that when a man is to be sent to do work in the country, time is allowed for the man to pack his tools, and he does so, and carries them to his master's office, and then goes to the place in the country, the master paying the man's coach fare, and sending and paying the carriage of the tools; and when the man's work is done there, the master is at the expense of the man's coach fare back to London, and also the carriage of the tools; and the men are allowed for their time in travelling at the same rate as when at work: but the witnesses, who were called to prove the custom, stated, that if the man, while in the country, was dismissed for gross misconduct, or dismissed himself, the custom was for the master not to pay either the man's coach fare back to London, or the back carriage of his tools.

Thesiger, for the defendant.—The plaintiff sues on a custom of the trade, grafted on his contract with the defendant. The custom is stated generally in the declaration, and the evidence is of a custom, with restrictions as to dismissal for cause, and where the person dismisses himself. The authorities shew, that, if a qualified custom be proved, that does not support an allegation of a general custom.

Cockburn.—I hope that your Lordship will allow us to amend, by adding the exceptions of a dismissal for cause, or by the party himself.

COLERIDGE, J.—You wish to introduce those exceptions, and to allege that the plaintiff was not dismissed for cause?

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Cockburn.—And also that the plaintiff did not dismiss himself.

Thesiger.—If it had been so alleged in the first instance, we might have traversed the allegation, and concluded to the country.

Cockburn.—That would be a matter entirely beside the merits, and would merely affect the right to reply.

COLERIDGE, J.—I think I ought to allow the amendments; but it must be on payment of such costs as are occasioned by them.

On the part of the defendant—it appeared, that the plaintiff and other workmen of the defendant were at work at Staunton House, the residence of the Rev. John Trenchard; and that, in the month of May, 1839, the defendant's foreman (in consequence of a complaint from Mr. Trenchard's gamekeeper) directed the plaintiff to keep off the preserves, and keep on the foot-paths; and it was proved by Mr. Trenchard, that, on the evening of the 15th of June, he found the plaintiff and two other of the workmen in one of his preserves, in which there was no path; and that he, believing they had been poaching, desired to see what they had got in a handkerchief which the plaintiff carried, and the plaintiff produced two young pigeons, which appeared to have been taken from a nest; and that on his desiring the plaintiff to replace them in the nest, the plaintiff did so. Mr. Trenchard also stated, that, at that time of the year it was important that his preserves should not be disturbed, as the pheasants were sitting. It was further proved, that, on the same evening Mr. Trenchard complained of the conduct of the plaintiff to the defendant's foreman, and the plaintiff was, in consequence, dismissed.

Cockburn.—It is for your Lordship to say whether this is a sufficient ground of dismissal. In the case of *Callo* v.

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Brouncker (*a*), Mr. Justice *J. Parke* lays it down, that master may dismiss his servant for moral misconduct, w ful disobedience, or habitual neglect. Here the plaint was not guilty of any misconduct in his service.

COLERIDGE, J.—I think it is a question for the jur This is not at all like the case of a yearly servant, whi the plaintiff was in the case you have cited. If the persons had been found poaching, that would not ha been misconduct in their employment; but could any o say that the defendant would not have been justified i discharging them for it?

Cockburn.—That would be "moral misconduct."

COLERIDGE, J.—Not in the sense in which Mr. Justi *J. Parke* uses the term.

Cockburn, in reply.—This was not misconduct by th plaintiff in his service, and is not such conduct as the ma ter has any control over. If these men had gone out f a walk, and had trespassed, is that any ground for th master dismissing them? It is not enough that M Trenchard desired that they should be dismissed. If M Trenchard has had any right infringed, he has his remedy but he cannot insist that the defendant shall dismiss hi men. There is no ground for supposing that these me had been poaching. The allegation in the plea, is, th the plaintiff was to conduct himself honestly, justly, an with propriety.—Of what dishonesty, injustice, or impro priety has he been guilty?

COLERIDGE, J., (in summing up).—There is now n doubt as to the custom, as it is conceded that the master i to be at the expense of bringing the man and his too

(*a*) Ante, Vol. 4, p. 518.

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back to London; but that that does not apply, if the service is terminated in the middle of the work, either by the misconduct of the man, or by his dismissing himself. The only question is, whether the defendant was justified in dismissing the plaintiff, under the particular circumstances of this case? This is not like the case of a yearly servant, where the contract is more permanent; for, as far as we know, this contract might not have extended beyond this particular work. It is proved that the plaintiff went to Staunton in March, and was dismissed in June, and that the game is preserved on this property. Now, Mr. Trenchard had as much right to preserve his game, as any other gentleman has to preserve his flower-garden; and it is proved, that a communication was made to the plaintiff from the gamekeeper in May, and that in June Mr. Trenchard found the plaintiff in the preserves, as he suspected for the purpose of poaching, but of that there is no evidence; and then Mr. Trenchard complains of the plaintiff, and he is dismissed. It has been said, that this afforded no just ground of dismissal, and that the plaintiff was merely taking a walk. However, in dealing with this question, I think that you ought to consider what Mr. Trenchard had a right to expect from the defendant and his men. If a gentleman engages a tradesman who has several workmen under him, he has a right to expect that the workmen will conduct themselves well; and Mr. Trenchard might very reasonably say, that he would not have all these men walking in his preserves, because they might do as much harm in July by walking there, as they might do in October by killing the game. It is said that they did no damage; but I do not think that it entirely depends on that, because it might have been, that Mr. Trenchard might have said, I will not allow the workmen to go into my garden; and if they had done so, they would have done no actual damage; but still, if the defendant employed persons who acted in that way, he would soon find that he was injured in his business, and would lose his custom, be-

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cause gentlemen would not engage him. You will say, whether the plaintiff did not go down to Staunton on the understanding, and undertaking, that he was to conduct himself decorously and properly, and whether the defendant was not justified in dismissing him.

Verdict—for the plaintiff on the 1st and 4th issues, and for the defendant on the 2nd and 3rd.

Cockburn, and *E. James*, for the plaintiff.

Thesiger, and *Ogle*, for the defendant.

[Attornies—*E. & T. S. Keightley*, and *Turner*.]

Adjourned Sittings in London after Michaelmas Term, 1840.

BEFORE LORD DENMAN, C. J.

CARMAN *v.* EDWARDS and WORMALD, Gent. two &c.

Dec. 11*th*.

A. accepted a bill for £15, drawn on him by B., which B. indorsed to C., and which was dishonored. B. owed A. a balance of £102. and several months after, on B. & C. balancing their account, a small balance was found to be in favour of B., which was paid by C. to B., and the bill given back to B. After this M. desired Messrs. E. & W. to bring an action on the bill in the name of C., and gave them the bill and a letter from A. to C. on the subject of it. Messrs. E. & W. commenced an action against A. at the suit of C., and A. paid them the amount of the bill and interest, and also the costs. It was proved by C. that he had never given any authority for the bringing of this action:—*Held*, that A. might recover back the amount of the bill, and interest and costs, from Messrs. E. & W. in an action for money had and received; and that their having acted bonâ fide on the belief that they had the authority of C., and the fact of their having paid over the amount of the bill and interest to M., were no grounds of defence to such an action.

ASSUMPSIT for money had and received, with a count upon an account stated. Plea, non-assumpsit.

It appeared, that, in the year 1839, a person named Strutt had drawn a bill of exchange on the plaintiff for £15, which the plaintiff had accepted, and this bill had been indorsed, by Strutt, to a person named Corner, in whose hands it was when it became due, in April, 1839.

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Previously to that time the plaintiff had stopped payment, and at that time Strutt owed the plaintiff a balance of 109*l.* 2*s.* 10*d.* and Strutt therefore could not have successfully sued the plaintiff if the bill had been in his hands. On the 4th of November, 1839, there was a settlement of accounts between Corner and Strutt, and there then being a balance of a few shillings in favour of Strutt, it was paid to him by Corner, and the bill for £15 given back to Strutt. On the 6th of November, 1839, the plaintiff was served with a copy of writ of summonses at the suit of Corner, the writ being indorsed as follows :—

"This writ was issued by Messrs. Edwards & Wormald, No. 2, Great James Street, Bedford-row, in the county of Middlesex, attornies for the said Henry Corner.

"The plaintiff claims £15, with interest thereon, from 29th January, 1839, until day of payment, for debt, and 1*l.* 15*s.* for costs; and if the amount thereof be paid to the plaintiff or his attornies within four days from the service hereof, further proceedings will be stayed."

It was proved by a witness named Eedes, that he, by the desire of the plaintiff, called on the defendants, and paid them 15*l.* 10*s.* as the amount of the bill of exchange and interest, and £3 for costs, and received back the bill. It was also proved by Mr. Corner that he had never authorized the defendants to bring any action against the plaintiff, and did not even know them; but this witness also stated, that a person named Musson had asked him to allow the defendants to bring the action, but that he always refused his consent; and in his cross-examination he also stated, that he gave Strutt a letter which had been written to him by the plaintiff, on the subject of the non-payment of this bill of exchange, at the same time when he gave him back the bill.

Erle, for the defendants.—I submit that this action is not maintainable, and that, at all events, no blame attaches

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to the defendants. I am in no situation to contend that they had the actual authority of Mr. Corner; but I am in a condition to show that the bill was brought to the defendants by Musson, together with the letter which the plaintiff had addressed to Mr. Corner, and that Strutt had desired Musson to give directions to the defendants to sue the plaintiff. After this a writ was sued out, and the plaintiff voluntarily paid the sum of 18*l*. 10*s*. to the defendants. It all arises from the misconduct of Strutt; but it is a question whether, as there is no privity of contract between the plaintiff and the defendants, this action can be maintained; and I submit also, that, to support any action in a case of this kind, there must be mala fides. However, in the present case, so far from that, there was a mutual mistake of fact by the plaintiff and also by the defendants; and that being so, I submit that the present action will not lie: and in addition to this, I am in a condition to prove that the sum of 15*l*. 10*s*. for the amount of the bill and interest has been paid over to Musson.

Lord DENMAN, C. J.—Giving you credit, Mr. *Erle*, for all the facts you have opened, I am of opinion that they afford no answer to the present action. Your clients should have ascertained whether they had the authority of the person in whose name they sued, before they brought the action. It was their own neglect if they did not do so, and I think that they were guilty of negligence in bringing an action for a man they never saw, without first ascertaining that they had his authority. The plaintiff is in no fault at all, and the defendants have received money that they had no right to, and that is money had and received to the plaintiff's use. I think, also, that the bona fides of the defendants, and the fact of their having paid over the money to Musson, are no grounds of defence. The defendants acted on the supposition that they

had an authority which they had not. There must be a verdict for the plaintiff (*a*).

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Vedict for the plaintiff—Damages, 18*l.* 10*s.*

Thesiger and *Carrington*, for the plaintiff.

Erle and *Atherton*, for the defendants.

[Attornies—*T. Dimes*, and *Edwards & Wormald.*]

In the ensuing term *Atherton* applied to the Court, to reduce the damages to the sum of £3, the amount of costs received by the defendants, but the Court refused a rule.

(*a*) In the case of *Robson* v. *Eaton*, 1 T. R. 62, it was held, that, if A. be indebted to B. and pay such debt to the attorney of a person suing A. in B.'s name, but without his authority, A. is liable notwithstanding to pay B. again, and A.'s remedy is against the attorney, although the attorney conceived he was acting under the real authority of B. See also the case of *Dupen* v. *Keeling*, ante, Vol. 4, p. 102.

BEFORE MR. BARON GURNEY.

(*Who sat for the Lord Chief Justice.*)

LEES *v.* HOFFSTADT.

Dec. 14*th.*

In assumpsit by the holder against the acceptor of a bill of exchange, the declaration stated that *the drawer indorsed to the plaintiff.* The defendant pleaded that the bill was drawn and accepted for his accommodation, and handed to the drawer that he might get it discounted; that the drawer indorsed it in blank, and delivered it to one A. to get it discounted, who, against good faith, delivered it to the plaintiff for a purpose unknown to the defendant, of all which facts the plaintiff had notice:—*Held*, that on this state of the pleadings the defendant must begin.

ASSUMPSIT on a bill of exchange by the holder against the acceptor. The declaration stated, that Rogers the drawer, indorsed to the plaintiff. The defendant pleaded specially, that the bill was drawn and accepted for

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the defendant's accommodation, and intended to the drawer that he might get it discounted: that the drawer indorsed it in blank, and delivered it to one Atkinson to get it discounted, who, against good faith, delivered it to the plaintiff, for a purpose unknown to the defendant, and that the plaintiff had notice of these facts. The replication was de injuriâ.

Humfrey, for the plaintiff.—The defendant must begin, as the issue is on him.

Bramwell, for the defendant.—The plea is, in effect, a plea that Rogers, the drawer, did not indorse to the plaintiff. Atkinson, like any other holder, had a power to indorse, for any purpose, to any person not having notice of his limited rights. Here the plaintiff had that notice, and therefore he cannot rely on the general implied power of a holder to indorse. Nor can he rely on the express power given to Atkinson by Rogers, because this was not an indorsement in pursuance of that power. In other words, the delivery to the plaintiff was unauthorized, and he knew it. The facts stated would have maintained a traverse that Rogers did not indorse in answer to primâ facie evidence that he did. This case is distinguishable from cases imputing fraud; as, in them, an indorsement in fact is admitted. Here, the defendant need not prove any fraud in the plaintiff's acquisition of the bill; because Atkinson may have delivered it to him, and he may have taken it to discount bonâ fide, and then the wrong will be in now claiming to sue. This is an argumentative plea amounting to this, "Rogers did not indorse." At all events the plea is, that the plaintiff is not the true holder of the bill.

GURNEY, B.—The defendant must begin.

Verdict for the plaintiff.

Humfrey, and *Swan*, for the plaintiff.

Bramwell, for the defendant.

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[Attornies—*Dickson* and *Dickenson & Ayerst.*]

BEFORE MR. JUSTICE COLERIDGE.

(*Who sat for the Lord Chief Justice.*)

SILLS *v.* BROWN.

Dec. 21*st.*

The question in what is called a running down case, is. whether the plaintiff, by his negligence or improper conduct, substantially contributed to the occurrence of the injury of which he complains; *not* to the *amount* of it, but to its occurrence. Therefore where a brig was carrying the anchor in a position contrary to the by-laws of the River Thames, at the time when she came in collision with a barge, it was *Held*, that the improper carrying of the anchor would not of itself be sufficient to make the owner of the brig responsible in damages, if the barge, by departing from the known rule of the river, brought herself into the situation in which the brig struck her, although but for the position of the anchor the collision would not have produced the injury complained of. The deposition of a witness taken before the coroner on an inquiry touching the death of a person killed by the collision, is receivable in evidence in the action for damages, if the witness be shewn to be beyond the sea.

A nautical witness cannot be asked whether he thinks, having heard the evidence in the cause, that the conduct of the captain was correct or not.

Evidence of a practice in contravention of a by-law is not receivable.

The rule of the river is, that, if a light vessel is going free, and a loaded vessel is coming close hauled to the wind, it is the duty of the loaded vessel to keep her course, and of the vessel going free to bear away.

THE declaration stated, that the plaintiff was possessed of a barge called the "Maria," with divers sails, tackle, &c. and of a boat fastened to it, and of a cargo of stone on board the barge, which said barge was lawfully sailing in the river Thames; and the defendant was possessed of a certain brig called the "Jarrow," sailing in the said river, under the management of his servants; and also of a certain anchor, which was suspended from and annexed to the said brig; yet the defendant not regarding his duty, on the 17th October, 1838, by his said servants, took so little and such bad and improper care of his said brig, and of the said anchor, in the direction and management of the same, and conducted himself by his said servants in so negligent, careless, unskilful and improper a manner, that the said brig, with the said anchor so suspended, &c. &c., ran foul of

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and struck against the barge, and the anchor pierced, broke, shattered, damaged, and injured the said barge; so that the same, with the cargo of stone, &c., sunk in the river, and became wholly lost to the plaintiff, &c., &c., &c.—Plea—Not Guilty.

The facts of the case were in substance as follow:—The plaintiff's barge, on the night of the 18th October, 1838, started from that part of the river Thames, which is called the North Fleet Hope, and was proceeding with the tide, but against the wind, up the river. The state of the tide was what is called young flood. The wind was W. N. W.; the night was clear, so that both shores were discoverable, and a vessel could see another at a distance of about a quarter of a mile off. The barge, which was loaded, was standing across to the south shore. The defendant's brig, which was light, was going down the river with the anchor hanging from the larboard bow, so as that a portion of it was under water. This was done, because the intention was to drop the anchor (which had not long been taken up) again, as soon as they could find a convenient berth. The men on board the barge, seeing the brig coming down, as they thought, in such a line that, if the barge had continued her course, the brig would have struck her amidships, ported their helm and got into stays, which caused the anchor of the brig to strike the barge, so as to sink it, and unfortunately to cause the death of the plaintiff's son, who was on board at the time. It was agreed on both sides, that the rule of the river is, that if a light vessel is going free, and a loaded vessel is coming close hauled to the wind, it is the duty of the loaded vessel to keep her course, and of the vessel going free to bear away.

On the part of the plaintiff it was contended, that the deviation from the general rule, on the part of the men who were on board the barge, was rendered necessary by the dangerous position in which the barge was placed, by the brig's neglecting, as they said, to bear away, but coming in such a direction, that, if they had not put their helm down,

the brig would have struck the barge. It was also contended, on the part of the plaintiff, that the anchor of the brig was carried in a position which was forbidden by the by-laws made for the regulation of the river, and that no injury would have been done to the barge at all, if the anchor had not been in such improper position. On the part of the defendant, it was contended, that the men on board the barge brought the injury on themselves, by improperly and unnecessarily departing from the rule of the river, and not keeping their course, as they were bound to do. This was the main question of fact in the case.

A witness had been examined before the coroner, on the inquiry concerning the death of the plaintiff's son, and since his examination had gone abroad. It was proposed on the part of the defendant, to read his deposition, taken on oath, before the coroner. This was objected to on the part of the plaintiff, but

COLERIDGE, J., was of opinion that, under the circumstances, the deposition ought to be admitted, and, being properly proved, it was read in evidence (*a*).

Capt. Rowland, one of the harbour-masters of the port of London, produced a by-law against carrying the anchor in the position in which the anchor was on board the brig. He was asked, on the part of the defendant, whether, not-

(*a*) In Phillipps's Law of Evidence, Part II, ch. 4, s. 2, (Vol. I, p. 374, 5th edit.), it is said, "A book of authority" [Buller's Nisi Prius] "after stating the general rule, that depositions are not evidence where there cannot be a cross-examination, adds, by way of exception, 'yet if the witnesses, examined on a coroner's inquest be dead, *or beyond sea*, their depositions may be read; for the coroner is an officer appointed on behalf of the public to make inquiry about the matters within his jurisdiction.'" And Mr. Phillipps further states, "It seems to be the *prevailing opinion* that they are admissible, though the prisoner may have been absent at the time of taking the inquisition."—For the mode of proof, see the page above-mentioned, viz. 374.

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withstanding the by-law, it was not the practice so t carry it in some parts of the river?

Thesiger, for the plaintiff, objected to evidence of practice contrary to the by-law.

Cresswell, for the defendant, contended that the value o the by-law did not decide the question of negligence, an therefore the practice, though contrary to it, was evidenc in the case.

COLERIDGE, J.—Was of opinion that evidence of th practice in contravention of the by-law was not admis sible (*a*).

Capt. Rowland was then asked, whether, having hear the evidence in the cause, he thought the conduct of th captain of the brig was right or not?

Thesiger, for the plaintiff, objected.—This is puttin Captain Rowland in the place of the jury.

Cresswell, for the defendant.—It is a matter of skil We cannot get a nautical jury. It is similar to cases i which a medical question arises, and then witnesses ar asked whether, in their opinion, the treatment was correc or not.

(*a*) In the case of *Marriott* v. *Stanley*, where the plaintiff sought to recover damages for a personal injury sustained by him in consequence of the defendants having wrongfully exposed to sale certain articles of ironmongery on a public highway at Northampton, in defiance of a local regulation, imposing a fine of £5 for so doing. In that case it was suggested, (but no evidence appears to have been offered of the fact,) that it was usu for the tradesmen of the town t place their goods at the road sid on market days. The learne Judge who tried the cause, told th jury inter alia, that the placin of the goods on the highway was a unlawful act, and that no loc usage or custom could make it law ful.—See further, as to this cas in the note at the end of *Raisin* *Mitchell, and others*, post.

COLERIDGE, J.—I think you cannot ask the witness to draw a conclusion of fact, and then give hisopinion upon it.

The question, in the form objected to, was not put; but the opinion of the witness was obtained by his being asked, what was the duty of a captain under certain specified circumstances.

COLERIDGE, J., in his summing up, told the jury, that, if it was a pure accident, or if the plaintiff's servants substantially contributed to the injury by their improper or negligent conduct, the defendant would be entitled to their verdict; but that, on the contrary, if the injury was occasioned by the improper or negligent conduct of the defendant's servants, and the plaintiff's servants did not substantially contribute to produce it, then the plaintiff would be entitled to their verdict. His Lordship also told them, that if the mode of carrying the anchor contrary to the by-law was the cause of the injury, and the plaintiff's servants did not substantially contribute to produce it, the defendant would be liable, although the captain of the brig might, for his convenience, have reasonably carried the anchor in such a position.—[After reading over the evidence, and commenting upon it, his Lordship said].—If you think the mischief was occasioned by any want of skill, or by any negligence or any improper conduct whatever on the part of the men on board the brig, without the men on board the barge having substantially contributed to produce it, then the plaintiff will be entitled to your verdict. On the other hand, if you think that the men on board the barge substantially contributed to the mischief—to its happening—to its taking place—then the defendant will be entitled to your verdict.

One of the jury afterwards asked his Lordship whether he had not told them, that the way in which the anchor was placed had nothing to do with the question.

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COLERIDGE, J.—No. You must have misunderstood my observations, if that was the impression you received. The position of the anchor will not be sufficient to make the defendant liable, if the plaintiff, by his servants, substantially contributed to *the occurrence* of the injury, *not to its amount*, but to *the occurrence of it*. The plaintiff says, that, if the anchor had not been in the position in which it was, no injury would have occurred at all; but that would not make the defendant liable, if the people on board the plaintiff's barge brought it by improper or careless navigation into the position in which it received the injury.

Verdict for the defendant.

Thesiger and *Ogle*, for the plaintiff.

C. Cresswell, *R. V. Richards*, and *E. James*, for the defendant.

[Attornies—*W. Richardson*, and *Wood & Ellis*.]

See the case of *Raisin* v. *Mitchell and others*, post, and the cases there referred to in the note at the end of it.

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COURT OF COMMON PLEAS.

Adjourned Sittings in London after Hilary Term, 1839.

BEFORE MR. JUSTICE ERSKINE.

(*Who sat for the Lord Chief Justice.*)

SLEATH *v.* WILSON.

Feb. 19*th.*

If a servant without his master's knowledge take his master's carriage out of the coach-house, and with it commit an injury, the master is not liable; because he has not in such case intrusted the servant with the carriage. But whenever the master has intrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it; but the master in such case will be liable, because he has put it in the servant's power to mismanage the carriage, by intrusting him with it. Therefore, where a servant, having set his master down in Stamford Street, was directed by him to put up in Castle Street, Leicester Square; but instead of so doing went to deliver a parcel of his own in the Old Street Road, and in returning along it drove against an old woman and injured her; it was *Held*, that the master was responsible for his servant's act.

CASE to recover damages for an injury occasioned to the plaintiff by the negligent driving of a servant of the defendant. Pleas—1st, that the horse and carriage were not the defendant's; 2nd, that, the person driving was not the defendant's servant; 3rd, that, at the time when the injury was sustained, the horse and carriage were not in the employ of the defendant, but were improperly used by the person driving them for purposes of his own.

Wilde, Serjeant, in stating the plaintiff's case, referred to the case of *Joel* v. *Morison* (*a*).

(*a*) Ante, Vol. 6, p. 501—that case decides, that, if a servant driving his master's cart on his master's business, make a detour from the direct road for some purpose of his own, his master will be answerable in damages for any injury occasioned by his careless driving while so out of his road. But if a servant take his master's cart without leave, at a time when it is not wanted for the purposes of business, and drive it about solely for his own purpose, the master will not be answerable for any injury he may do.

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The witnesses on the part of the plaintiff stated, th the defendant's servant was driving a four-wheeled phaeto drawn by one horse, along the Old Street Road, at a quic pace; some described it as very fast, others as not so fas but they all agreed in the fact, that the plaintiff, who wa an old woman nearly seventy years of age, and was cross ing the road, was knocked down by one of the shafts of th carriage, and much bruised, and had some of her teet knocked out.

Slade, for the defendant.—The plaintiff's counsel mus make out two things to entitle him to a verdict:—1st, tha the servant was acting within the due scope of his autho rity; and, 2ndly, that he was driving carelessly. The cas cited for the plaintiff is not all-fours with the present. I rely on the case of *M'Manus* v. *Crickett* (*a*).

I shall shew that the servant, on the present occasio was acting contrary to the directions of his master. H had no business in Old Street Road at all; it was fou miles out of his way. My learned friend admits, that, if servant take his master's carriage without his knowledg the master will not be liable for his acts. I do not se any difference between that state of facts and this, so fa as the conduct of the servant is concerned. I see no dif ference between the servant in the present case drivin out of his way, and the servant in the case admitted, takin the carriage out of the coach-house, and using it for hi own purposes. As to the question of negligence, drivin on the wrong side of the road is not proof of negligence there is no obligation to keep on any particular side of th road, if there is room enough on the road, and no othe carriages are in the way.

(*a*) 1 East, 106—that case decides that a master is not liable for the *wilful* act of his servant in driving his carriage against another, without his direction or assent; bu only for damage arising from th *negligence* or *unskilfulness* of th servant, when acting in his emplo

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The servant who was driving the carriage was called as a witness, and said, "I drove my master to Great Stamford Street; my orders were, to put up at the Red Lion in Castle Street, Leicester Square, and meet my master at the Olympic Theatre; I went into Old Street Road on business for myself; I took a parcel for my wife to her father and mother; I was driving at a slow pace in Old Street Road; at a pace not exceeding four miles an hour; I called to the woman three times distinctly, as loud as I could; she took no notice; I pulled up immediately when I found she took no notice; the horse was walking then; her back was turned, and I suppose the shaft of the vehicle struck her on the shoulder; somebody seized the horse by the bit, and he reared on his hind legs, and backed; I was sitting low at the time; I went to the old woman, and offered her a recompense of £5; she said she could do nothing with it, I must speak to the gentleman; I went to him, and he said he would speak to the party, and I heard nothing more of it; a friend gave me the money." On his cross-examination, he said, "I do not know that that money came from my master; it was a friend at Turnham Green; I did not go to the old woman by my master's desire; the only conversation I had with my master before I went was being scolded for going out of my way; the name of the person I got the money from was Barnett; he is a gentleman, a lawyer; as far as I know, he is my master's lawyer; when I came back, I gave the money back to Mr. Barnett; it was dusk when I was in the Old Street Road; I saw an object as I was driving; it had a cloak on; I was quite pretty nearly at a stand still, when she ran herself against the shaft; she came in contact with the shaft; I was pulling up at the time; her back was towards the horse; she was looking a contrary way, and then she fell down; I suppose she fell down from fright; I got to the Red Lion about half-past seven; I went there the direct road from Old Street Road; I had lived with the defendant about a year and a

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half at the time, and lived with him about nine months after." In answer to questions from the Judge, he said: "My master did not know anything about my having the parcel to deliver; I left the carriage in a yard at the corner of Old Street Road, by Shoreditch, while I went to Bateman's Row with the parcel; this was about 200 yards from the place where the accident happened."

The gentleman at whose house in Stamford Street the defendant was set down, was also called as a witness for the defence, and stated, that the carriage arrived at his house about four in the afternoon, that he heard the defendant direct the servant to drive to some stables, the name of which he did not remember, and to meet him afterwards with the carriage at the Olympic Theatre, and that the servant turned round and drove the carriage in a direction which would lead towards Leicester Square.

Wilde, Serjt. in reply.—First, as to the law,—The rule of law I take to be this,—if you give your servant the care and control of your carriage and horses, and tell him to take the carriage to a given place, you place the carriage under his control as to the mode in which he is to arrive at that place, and for his conduct in the course of the execution of that order you will be responsible. We shall have next the case of a stage coach, and it will be said that if the coach does not go by the usual and direct road, the proprietors will not be liable.—The case cited of *M'Manus* v. *Crickett*, is quite a different case—there the servant had a spite against the officer, and drove against him.

ERSKINE, J.—It is quite a different case.

Wilde, Serjt.—It is an improper mode; but it is a mode of conducting the employment—the man was out of his road—his object was the Red Lion Stables, and he went out of his way for purposes of his own, but still it was an improper act while under his master's orders. It may be

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said next, that if the servant turns out of his road to get something to drink, the master will not be liable for any injury done by him. It is enough that it is in the course of his employ, though he acts improperly in carrying his master's orders into execution. The question is, was he when the act occurred in the course of the master's employ? if he was, the master will be liable.—After some observations by the learned Serjeant on the question of negligence,

ERSKINE, J., in summing up, said,—This is an action brought by the plaintiff to recover damages for an injury which she alleges she has sustained by the negligent conduct of the defendant's servant. The law has said that whenever an injury has been occasioned by the negligent conduct of a person in the service of another, the master is answerable for it; and this is for the purpose of inducing those who employ others to take care that they employ proper persons. The defendant pleads, first, that the horse and carriage were not his, and, secondly, that the servant was not his servant; but it has been clearly proved by the witnesses on the part of the defendant, that the carriage was the defendant's, and that the person driving it was his servant. But in addition to these he has pleaded, thirdly, that the horse and carriage at the time of the injury were not in the employ of the defendant, but were improperly used by the servant for purposes of his own; and evidence has been given that the master directed the servant to drive to the Red Lion, in Castle-street, Leicester-square, but that the servant improperly drove to the Old-street Road, to deliver a parcel of his own; and the point has been put to the Court, that inasmuch as it is clear that the servant was not at that time engaged in his master's business, this action cannot be maintained. But I am of opinion that this action may be maintained. I think the law has been most properly laid down by Mr. Baron *Parke*,

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in the case which has been cited. It is quite clear that if a servant without his master's knowledge takes his master's carriage out of the coach-house, and with it commits an injury, the master is not answerable; and on this ground, that the master has not entrusted the servant with the carriage. But whenever the master has entrusted the servant with the control of the carriage, it is no answer, that the servant acted improperly in the management of it. If it were, it might be contended that if a master directs his servant to drive slowly, and the servant disobeys his orders, and drives fast, and through his negligence occasions an injury, the master will not be liable. But that is not the law: the master in such a case will be liable, and the ground is, that he has put it in the servant's power to mismanage the carriage, by entrusting him with it. And in this case, I am of opinion, that the servant was acting in the course of his employment, and till he had deposited the carriage in the Red Lion Stables, in Castle-street, in Leicester-square, the defendant was liable for any injury which might be committed through his negligence.—After reading the evidence and observing on the question of negligence, his Lordship left the case to the Jury, who found a

Verdict for the plaintiff, damages £25.

Wilde, Serjt. and *Channell*, for the plaintiff.

Slade, for the defendant.

[Attornies—*W. Heath* and *Barnes & B.*]

See the case of *Lamb* v. *Lady Elizabeth Palk*, post, p. 629.

BEFORE LORD CHIEF JUSTICE TINDAL.

RAISIN *v.* MITCHELL and Others.

1839.

Feb. 20th.

In an action against the owner of a brig for an injury done to a sloop belonging to the plaintiff, the amount of damage proved was upwards of £500—the jury gave a verdict for £250 only, and on being asked how they made up their verdict, replied that in their opinion there were faults on both sides:—*Held*, that notwithstanding this the plaintiff was entitled to the verdict, as there might be faults in the plaintiff to a certain extent, and yet not to such an extent as to prevent his recovering.

THE declaration stated that on the 20th November, 1837, the plaintiff was possessed of a sloop which was at anchor in that part of the river Thames which is called the Lower Hope, and that the defendants were possessed of a brig which they by their servants so unskilfully and negligently navigated, that it ran against the plaintiff's sloop, and caused it to sink. Plea, not guilty.

Atcherley, Serjt., stated the plaintiff's case.—The sloop was of thirty-nine tons burthen, and on the day in question, being on a voyage from Cherburg, laden with eggs for the London market, came to an anchor about six in the evening in the Lower Hope; and the brig, which was called the Arethusa, and was of more than 300 tons burthen, came towards the sloop, and having its anchor a-cockbill, ran it into the side of the sloop and sunk the sloop. The brig had not a proper pilot, but only a waterman on board. The question will be whether or no the brig was in fault. I contend that she was, for three reasons:—1st, the sloop was at anchor; 2nd, the ground was ordinary anchoring ground; and, 3rdly, it is contrary to all seamanship for a vessel to sail with the anchor a-cockbill.

The captain of the sloop (a Frenchman) was called and examined through an interpreter—he said that he was forty-five years of age, was twenty-two years at sea before he was made a captain, and had been the voyage from Cherburg to London more than one hundred times, and that on the occasion in question, his vessel had been at anchor for more than a quarter of an hour. He described the way in which it was injured, as follows:—"When I saw the brig, her course was from the

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N.E.; she was coming towards London; she was coming upon the sloop; we hailed all together to her to change her course; she did not, but came down on the sloop with her main-sail, fore-sail, fore-top-sail, jib, and fore-and-aft fore-sail set. The fore-sail and jib of the sloop were furled, and the peak of the main-sail was lowered so as to prevent the wind from operating upon it; it was half an hour before high water; the head of the sloop was N.N.W., with fifteen fathom of chain out; the distance between the Essex shore and the sloop was about a third of the width of the river; when we saw the brig, the anchor of the brig was hanging at the cat-head; we told them to slack the chain, or they would break the sloop; we told them in these words, 'let go down—break the ship;' they would not; the fluke of the anchor was about a foot below the water, and if they had let fall the anchor, no damage would have happened: my mate got a hatchet and was going to cut, when a man on board the brig came with a handspike and said, 'you d—d Frenchman!' they let go the anchor when the fluke of it was in the sloop; the sloop was dragged off by the brig into the middle of the river though it was at anchor, for the anchor dragged: the brig got loose because she let go her anchor, and the weight of the chain dragged the anchor out: when the anchor came out of the sloop, we called to the brig for assistance; it carried off three feet of the plank, and the water ran in; the hole was above eight inches below the water, about one third the length of the sloop, from the stern on the starboard side; we let the anchor slip into the river, and called to the brig for assistance, that we might leave the anchor behind and run ashore; we got two men from the brig to assist us in setting the sails; we sank in about four fathoms water, about 800 feet from the shore; when we hailed the brig at first, we said, 'keep away, you run us down;' the brig could have avoided us by putting the helm a-starboard; there were some vessels to the south of us, but none to hinder the brig from tacking to the south;

it was not very dark, but there were no stars, and we saw the brig at 300 fathoms off; it was four or five minutes from the hailing to the striking; if they had kept a good look-out, they could have avoided us; nobody was on the look-out; the crew of the sloop escaped to shore in their own boat; we had 177 cases of eggs on board; the waterman was intoxicated, and when the captain left him he took a bottle of rum and drank out of it; the captain said to me, 'the waterman is drunk.' On his cross-examination he said, "there were myself and three others on board the sloop; they could not speak English, except a few words; we had no pilot on board; we never had one, but always had a waterman before, as soon as we could find one; we could not find one on this occasion; the waterman on board the brig had been once on board our sloop to pilot it; the wind at W. S. W. would be contrary just in that part for coming up the river."

The mate and two seamen of the sloop confirmed the captain's statement, and it further appeared that the sloop was afterwards got up, and the damage (with the exception of the value of the eggs) was admitted at 143*l.* 13*s.* The eggs were valued at £880, and were sold by auction at something above £400.

Thesiger, for the defendants.—1st, The captain of the French vessel, not himself understanding English, and having a crew who did not understand English, was bound to have a pilot who did understand it, to navigate his vessel; 2nd, the French vessel, according to my case, was not at anchor, but on the larboard tack, and that being so, and the brig being on the starboard tack, the French vessel ought to have given way and allowed the brig to keep her course; 3rd, as to the question of whether the sloop was in fact at anchor, the witnesses say the wind was stronger than the tide, and if that be so, the head of the vessel would have been in a different position from that in which they say it was.

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For the defendants the waterman was called as a witnes and gave a different account of the transaction as to th sloop being at anchor, and the state of the sails of bot vessels; he also swore that the custom of the river was a ways for a vessel on the larboard tack to give way to on on the starboard tack; also, that if the sloop had been a anchor, as the wind was fresh and the tide ebbing strong the brig would not have reached the sloop, and that in fac the sloop was called to three times to let go her anchor be fore she did so. He further said, "About twenty minute after the two vessels separated, the captain and myself an a boy got on board the sloop; the crew were all in the boat and the French captain would not come on board, saying he should lose his life; but the mate, after a good deal o persuasion, came on board and assisted in setting the sail to get on shore; if the Frenchmen had been active, th sloop might have got on shore before we reached her; in al square-rigged vessels you must cockbill the anchor befor anchoring." The witness also denied that he was drunk or that any one from the brig threatened a Frenchman with a handspike. The mate and others of the crew of the brig confirmed the leading facts of the waterman's statement and all swore that the sloop was not at anchor and ha not her sails furled.

Atcherley, Serjeant, replied.

TINDAL, C. J., in summing up, said, the question is, whe ther the plaintiff has made out a case to entitle him t damages. You must be satisfied that the injury was occa sioned by the want of care or the improper conduct of th defendants, and was not imputable in any degree t any want of care or any improper conduct on the part o the plaintiff.

The jury found for the plaintiff, damages £250, th amount claimed by him being upwards of £500.

1839.

RAISIN v. MITCHELL.

Atcherley, Serjeant, for the plaintiff.—There must be some mistake.

R. V. Richards, for the defendants.—There is not any mistake at all.

TINDAL, C. J., asked the jury how they made up their verdict.

The Foreman answered that there were faults on both sides.

TINDAL, C. J.—Then you have considered the whole matter.

The Foreman replied in the affirmative.

R. V. Richards submitted to his Lordship that the fact which the foreman of the jury had stated entitled the defendant to the verdict.

TINDAL, C. J.—No. There may be faults to a certain extent.

R. V. Richards requested his Lordship to take a note of his having made the objection.

TINDAL, C. J. assented, and the verdict was entered by the associate for £250 (*a*).

(*a*) The verdict in this case, as well as the opinion of the learned Chief Justice, seem to be quite correct, and sustainable in point of law, according to the most modern authorities.—In the case of *Bridge* v. *The Grand Junction Railway Company*, 3 Mee. & Wels. 244, which was an action on the case for the negligent management of a train of railway carriages, Mr. Baron *Parke* said—"There may have been negligence in both parties, and yet the plaintiff may be enti-

1839.

RAISIN v. MITCHELL.

Atcherley and *Bompas*, Serjts., and *Curwood* for t plaintiff.

Thesiger and *R. V. Richards* for the defendants.

[Attornies—*Jacobs* and *Warne*.]

tled to recover. The rule of law is laid down with perfect correctness in the case of *Butterfield* v. *Forrester*, [11 East. 60], and that rule is, that although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover: if by ordinary care he might have avoided them, he is the author of his own wrong. That is the only way in which the rule, as to the exercise of ordinary care, is applicable to questions of this kind." In the case of *Marriott* v. *Stanley*, 1 Scott New Cases, p. 392, it was held, that in an action to recover compensation in damages, for an injury occasioned by an obstruction in a highway, it was not a misdirection on the part of the Judge to leave it to the jury, to say—" whether or not the plaintiff was himself in any degree *the cause of the injury*—whether he had acted with *such a want of* reasonable and o dinary *care as to disentitle him* recover?" See also the cases the cited and referred to of *Smith Pelah*, 2 Stra. 1264, and *Bird Holbrook*, 1 Moo. & Payne, 60 and 4 Bing. 628.

The result of the cases seems be, that the fault of the plainti in order to prevent his recoverin must be one directly *tending to pr duce the injury;* as, for instance, if person be on the wrong side of t road, or in a state of drunkenne though in such case they wou neither of them be altogether fr from blame, yet they might recov in an action for damages, unless t being on the wrong side of the ro in the one case, or the being in state of drunkenness in the other, d rectly contributed to the occurren of the injury. On this point s particularly the concluding obse vations of Mr. Justice *Coleridge*, the case of *Sills* v. *Brown*, an p. 601.

COURT OF EXCHEQUER.

Adjourned Sittings in London after Trinity Term, 1840.

BEFORE LORD ABINGER, C. B.

1840.

July 2nd.

LONG *v.* HITCHCOCK.

A witness cannot be called to contradict another with respect to a statement suggested to have been made, if there be not an express denial by the party who is supposed to have made it of his having done so.

The plaintiff is to prove his case to the satisfaction of the jury; and, if he leaves it doubtful, either from the circumstances which surround it, or from the character of his witness, the defendant is entitled to the verdict.

CRIM. CON.—The only witness called on the part of the plaintiff to prove the adultery, was a man named Harris, who had been convicted of felony, and had also been several times in prison, charged with various offences.

On his cross-examination he was asked this question with reference to what he had described himself as having seen—"Will you swear that you did not tell your master only yesterday that you were drunk when you made the statement; and will you swear that it was not false; and that you did not tell your master that it was false?"

The witness answered that he would not.

C. Phillips, for the defendant, asked his Lordship if, under these circumstances, he thought there was any case to go to the jury.

LORD ABINGER, C. B.—I cannot say that there is not evidence for the consideration of the jury. It all rests upon the credit of the witness Harris.

C. Phillips was addressing the jury for the defence when one of them said that they wished to hear the evidence of Harris's master.

LORD ABINGER, C. B.—The master cannot be called as a witness, because the man would not swear that he did not

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LONG v. HITCHCOCK.

say that which was imputed to him. They cannot call one man to contradict another, unless that other swears positively on the subject (*a*). The plaintiff is to prove his case to your satisfaction, and if he leaves it doubtful, either from the circumstances which surround it, or from the character of his witness, then you cannot say that he has made it out.

Verdict for the defendant.

Kelly and *Bramwell* for the plaintiff.

C. Phillips and *C. C. Jones* for the defendant.

[Attornies—*J. T. Sleap* and *W. H. Garry*.]

(*a*) In the case of *Pain* v. *Beeston*, 1 Moo. & Rob. p. 20, it was decided that where a witness merely says he does not recollect making the statement, evidence to prove that he did make it is inadmissible; there must be an express denial. But see the case of *Crowley* v. *Page*, ante, Vol. 7, p. 789.

BURNETT *v.* BOUCH and Others.

July 4th.

The usage is, that when a broker has introduced the captain of a ship and a merchant together, and they by his means enter into some negociation as to the intended voyage, the broker is entitled to commission if a charter-party be effected between them for that voyage, even though they may employ another broker to prepare the charter-party, or may write the charter party themselves.

If a broker be authorized by both parties, and acting as the agent of each, communicates to the merchant what the ship-owner charges, and also communicates to the ship-owner what the merchant will give, and he names the ship and the parties so as to identify the transaction, and a charter-party be ultimately effected for that voyage, this broker is entitled to his commission; but if he does not mention the names so as to identify the transaction, he does not get his commission to the exclusion of another broker, who afterwards introduces the parties personally to each other.

A., a broker, introduced a merchant and a ship-owner together to treat for a charter-party: they finally made the charter-party through B., another broker. In an action by A. for his commission, the particulars of demand were "for commission due to the plaintiff *for procuring a charter* for a vessel called the W., &c.;"—*Held*, sufficient.

ASSUMPSIT for work and labour, with a count upon an account stated. Plea—Non assumpsit.

It was opened by *Erle*, for the plaintiff, That the plaintiff was a broker, and the defendants the owners of the ship Wilton; and that the question in this case was, whether the plaintiff was entitled to commission for having

found a freight for the ship Wilton, on the ground that the plaintiff, as the broker, had introduced the merchant to the shipowner, although the charter had been afterwards made through another broker. He stated the custom as applicable to these cases to be, that the broker who first introduces the parties to each other on the subject of the charter-party, is the person entitled to the commission if a charter be made between the parties so introduced; and that the circumstance of the charter-party being made at the office of another broker, would not deprive the broker who first introduced the parties to his right of commission.

It was proved, that, previously to the 2nd of April, 1840, Captain Wilson, who was captain and part owner of the Wilton, had applied to the plaintiff, and requested to be apprised of a West India voyage for the Wilton; and that the plaintiff had accordingly entered the Wilton in his book. It was further proved, that, on the 2nd of April, Mr. Ballard, a merchant, had applied to the plaintiff, stating that he wanted a vessel for a voyage to St. Domingo, and that the plaintiff mentioned the Wilton, and Mr. Ballard then asked to see the captain; and it also appeared that Captain Wilson and Mr. Ballard were introduced to each other at the plaintiff's counting-house on the morning of the same day, when Captain Wilson asked 4*l.* 10*s.* per ton for the freight, and Mr. Ballard offered 4*l.* 5*s.*; and on the plaintiff's managing clerk suggesting that 4*l.* 7*s.* 6*s.* should be the sum, Captain Wilson said he would consider of it, and give an answer on 'Change that afternoon; but it appeared that he did not go on 'Change, and that on the next day, when asked what he thought of the St. Domingo's voyage, he said he had closed it himself with Mr. Ballard.

Kelly, for the defendants.—I submit that the plaintiff cannot recover on the particulars of demand delivered in this action: they are—"In this Exchequer of Pleas, *Burnett* v. *Bouch and Others*.—This action is brought to re-

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cover the sum of 37*l.* 7*s.* 6*d.* for *commission due to t* *plaintiff for procuring a charter for a vessel* called th Wilton, whereof the defendants were owners, for a voya from London to Hayti in the month of April last." Th plaintiff did not procure the charter, which was conclude without him.

Lord ABINGER, C. B.—This particular could not hav deceived you at all. The plaintiff says that he introduce the parties, and that, as there was a charter, he is entitle to commission. I have heard the usage proved as M *Erle* has opened it.

With respect to the usage, Mr. Griffith was called. H said: "If a shipbroker introduces the party who ult mately charters the ship, he is the broker who receives th commission; and that is so whether he makes the charte party or not. If the charter-party is made upon the sam voyage, the broker would be entitled to commission, thoug the shipowner himself made the charter-party." In h cross-examination he said, "If a broker has introduce the parties, and the negociation has gone off upon th terms, and another broker arranges them, the first broke has the commission; I never heard of the second broke getting anything."

Mr. Wilkinson said, "The broker who first introduce the parties, having an authority to tender the ship, is en titled, if the bargain is finally made, though not in h office, provided the charter-party is made between the sam merchant and the same owner, and for the same voyage. Mr. Woollet and Mr. Walter confirmed this evidence.

It was opened by *Kelly*, for the defendants, that, earl in the month of March, the owners of the Wilton ha (through Mr. Harnett) applied to Messrs. Urquhart an Scruden to provide a charter for the Wilton, and that Mr Ballard applying to them for a ship, the bargain was con cluded through them on the 2nd of April; and each part

found that the other was the same that he had met at the plaintiff's on that morning.

On the part of the defendant Mr. Scruden was called. He said:—"In the middle of March, Mr. Harnett applied to us to get a charter for this ship; and, about the 16th of that month, Captain Wilson asked me if we could get him a charter: I made no entry of the ship in our books; it is not our practice; I obtained from him all the information as to the name, tonnage, and draft of the ship. About the same time Mr. Ballard said he wanted a ship for St. Domingo at 4*l.* 7*s.* 6*d.* I mentioned these terms to Captain Wilson, and he wanted 4*l.* 10*s.*: he called on me again on the 2nd of April at about ten o'clock, A.M., and said he would take 4*l.* 7*s.* 6*d.* I said the merchant would be at my office at about twelve; but it being inconvenient to him to come at that hour, he said he would come at three: at about twelve Mr. Ballard called, and I told him I had got a vessel on his terms. I had not mentioned Mr. Ballard's name to Captain Wilson, neither had I mentioned Captain Wilson's name to Mr. Ballard, nor had I named the ship: at three o'clock the parties met at our office, and they recognised each other as having met at Mr. Burnett's. I told each that I had agreed with the other, and the charter-party was drawn and signed."

The witnesses for the plaintiff, who had deposed to the usage, were recalled by Lord *Abinger*, C. B., and stated, that to entitle a broker to commission, as having introduced the parties, he should mention the names of the parties or the name of the ship, and that the mention of the tonnage and voyage was not sufficient; but Mr. Harnett, who was called as a witness for the defendant, stated that in his judgment the mentioning the names was not material; and Mr. Forsyth, who was also called for the defendant, said, "I am the partner of Alderman Pirie as a shipbroker; if a broker is employed by both parties, and communicates between them, and effects the charter-party, but before it is effected, another broker interposes, and intro-

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duces the parties personally, I should say that the person who effects the charter-party is the person to be paid, although the parties had been personally introduced by another."

Erle, in reply.—The broker who first introduces the parties, or who first mentions the name of each to the other, or names the ship, is the person to be paid, though he does not effect the charter-party. If the parties had been named by Mr. Scruden, they would have known at the plaintiff's that they were the same persons who had been negociating at Messrs. Urquhart & Scruden's; and if it were not necessary to name the parties or the ship, or to say something which would completely identify the transaction, a broker might change the ship, and put in another ship pending the negociation. The parties were never introduced at Messrs. Urquhart & Scruden's till the afternoon of the 2nd of April, and then it was found that they had been introduced before by the plaintiff.

Lord ABINGER, C. B. (in summing up.)—It is perfectly usual for parties to go to several brokers, and state on each side, what the one offers, and what the other is willing to take; and if there was no usage as to commission, great confusion might arise, particularly if it was not necessary to name either the vessel or the parties. The rule as stated by the plaintiff's witnesses is this: when a broker has introduced the captain and merchant together, and they by his means enter into some negociation as to the voyage, he is entitled to commission if a charter-party be effected between them for that voyage, even though they may employ another broker to prepare the charter-party, or may write the charter-party themselves. The usage goes further, that if a broker authorized by both parties, and acting as the agent of each, communicates to the merchant what the shipowner charges, and also communicates to the shipowner what the merchant will give, and he name

the ship and the parties, so as to identify the transaction, and a charter-party be ultimately effected for that voyage, this broker is entitled to commission; but if he does not mention the names, so as to identify the transaction, he does not get his commission to the exclusion of another broker who afterwards introduces the parties personally to each other; and it has been observed with some force, that if the ship and parties were not named, the broker might change the ship, and put in another pending the negociation. You will say whether it is not a reasonable qualification of the usage, that if the first broker has not named the parties or the ship, he is not entitled to commission to the exclusion of another broker who afterwards introduces the parties to each other. If Mr. Scruden had named either the parties or the vessel, either party might have said, "we are negociating already;" and I think that this case fully illustrates the necessity of mentioning the names. If Mr. Scruden had mentioned the names, he would clearly have been entitled to the commission; but as he did not do so, you will say whether the plaintiff is not entitled to it (*a*).

Verdict for the plaintiff,—damages £37 7*s*. 6*d*.

Erle and *Montagu Smith* for the plaintiff.

Kelly and *Hughes* for the defendants.

[Attornies—*Pering & Co.* and *Amory & Co.*]

(*a*) See the case of *Brown* v. *Nairne*, *ante*, p. 204.

1840.

BLAKE *v.* BARNARD.

July 8th.

In an action for an assault the declaration stated that the defendant assaulted the plaintiff, "and also then presented a certain pistol loaded with gunpowder, ball, and shot, at the plaintiff, and threatened and offered therewith to shoot the plaintiff, and blow out his brains." To this the defendant pleaded not guilty, and it was proved that the parties being on board a ship, the defendant (who was the captain) went into his cabin and brought out a pistol and cocked it, and presented it at the plaintiff's head, saying, that if the plaintiff was not quiet he would blow his brains out:—*Held*, that if the defendant, at the time he presented the pistol, used words shewing that it was not his intention to shoot the plaintiff, this would be no assault:—*Held*, also, that it was incumbent on the plaintiff to substantiate the allegation in the declaration, that the pistol was loaded with gunpowder, ball, and shot, and that unless the jury were satisfied that the pistol was loaded they ought to find for the defendant.

ASSAULT and false imprisonment.—The first count of the declaration stated, that the defendant assaulted and beat the plaintiff, "and also then presented a certain pistol loaded with gunpowder, ball, and shot at the plaintiff, and threatened and offered therewith to shoot the plaintiff and blow out his brains." 2nd count for false imprisonment.

Pleas—First, to the whole declaration, not guilty.—Second, as to the first count, "except as to the presenting of the said pistol, and threatening and offering therewith to shoot the plaintiff as therein mentioned," that the plaintiff and William Lock were fighting together, whereupon the defendant, being present, in order to separate them, gently laid his hands on the plaintiff, whereupon the plaintiff made an assault on the defendant, and would have beaten, wounded, and ill-treated the defendant, if the defendant had not defended himself; whereupon the defendant did defend himself, and in so doing, did necessarily and to a little degree, commit the trespasses in the introductory part of this plea mentioned, doing no unnecessary damage to the plaintiff.—Third, as to the first count with a similar exception, that the defendant was commander of the ship or vessel Eleanor, and the plaintiff a mariner on board the same and belonging thereto; and that the plaintiff and William Lock were fighting together on board the said ship, and the plaintiff was conducting himself in a riotous, mutinous, and disorderly manner; whereupon the defendant so being such commander, and, as such commander, for the preservation of discipline and order in the said ship, and that the plaintiff and W. Lock might do no hurt to each other, and in order to separate them, gently

laid his hands on the plaintiff, whereupon the plaintiff made an assault on the defendant, &c. (as in the last plea). Fourth, to the first count—son assault demesne. Fifth, to the second count—that the defendant was commander of the Eleanor, and the plaintiff a mariner in and belonging to her, and that the plaintiff had deserted the ship for five hours, and was fighting with W. Lock, and behaving in a mutinous, disorderly, and improper manner on board the ship, and it was necessary that for this assault and conduct the plaintiff should be kept apart from the other mariners on board the ship: whereupon the defendant, so being such commander, and as such commander, for the preservation of discipline and order on board the ship, and for imprisoning and punishing the plaintiff for the cause aforesaid, gently laid his hands on the plaintiff, and imprisoned him.

Replication to the second and third pleas, that the defendant committed the trespasses in the introductory parts of those pleas mentioned, with more force and violence than was necessary for the purposes in those pleas mentioned.

To the fourth plea, de injuriâ, and to the fifth plea, that the defendant imprisoned the plaintiff for a longer time and with more severity than was reasonable, necessary, or lawful, in respect of the offences and misconduct of the plaintiff in the said last plea mentioned—Rejoinder, denying the excesses charged by replication to the second, third, and fifth pleas.

It was proved by Mr. Coates, the surgeon of the ship Eleanor, that she was a South Sea Whaler, and that on the 13th of December, 1839, the ship being at anchor in the Bay of Conception, which is on the Coast of Chili, the plaintiff and others had gone ashore and did not return on board till the next morning: and that on that morning William Lock challenged the plaintiff to fight, when some blows passed between them, and the defendant, who was the commander of the ship, came up and struck the plaintiff, and the plaintiff struck him; whereupon the defendant

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ordered the plaintiff below, and went below himself. This witness also proved that the plaintiff was not allowed to leave his berth for about four months, at the end of which time the ship arrived in the docks. It was also proved by a cabin-boy named Coleman, that on the 14th of December, 1839, he saw the plaintiff and defendant go below, as stated by the last witness, and he also said as follows:—"The captain went into his cabin, brought out a pistol and cocked it, and presented it at Blake's head, and said if Blake was not quiet he would blow his brains out."

Lord ABINGER, C. B. (in summing up.)—With respect to the assault which is alleged to have been committed with the pistol, if the defendant, at the time he presented it, added words shewing that it was not his intention to shoot the plaintiff, that would be no assault; and besides, there is no evidence that the pistol was loaded. It is stated in the declaration, that the pistol was loaded with gunpowder, ball, and shot, and it is for the plaintiff to make that out, and he has not done so. If the pistol was not loaded, it would be no assault; and unless you are satisfied that the pistol was loaded, you ought to find for the defendant as to that part of the case, and return a verdict that the defendant was guilty of assaulting the plaintiff, but not with a pistol (*a*).

His Lordship left the case to the jury on the questions of excess raised on the second, third, and fifth pleas.

Verdict for the plaintiff on the fourth issue, and on the first issue, except as to the assault with the pistol; and for the defendant as to the residue.

Shee, Serjeant, and *Miller*, for the plaintiff.

Thesiger and *Chandless* for the defendant.

[Attornies—*Wontner* and *Lawrence & Blenkarne*.]

(*a*) See the cases of *Reg.* v. *St. George*, *ante*, p. 483, and *Reg.* v. *Oxford*, *ante*, p. 525.

1840.

Adjourned Sittings at Westminster after Michaelmas Term, 1840.

BEFORE MR. BARON GURNEY.

LAMB *v.* LADY ELIZABETH PALK.

Dec. 1*st.*

A van was standing at the door of A., from which A.'s goods were unloading, and A.'s gig was standing behind the van. B.'s coachman, who was driving B.'s carriage, came up, and there not being room for the carriage to pass, the coachman got off his box and laid hold of the van horse's head: this caused the van to move, and thereby a packing case fell out of the van upon the shafts of the gig and broke them:—*Held*, that B. was not liable for this, as the coachman was not acting in the employ of B. at the time this matter occurred.

CASE.—The declaration stated that the plaintiff "heretofore, to wit, on the second day of June, 1840, was lawfully possessed as well of a certain carriage, to wit, a gig of value, to wit, of the value of £80, as of a certain case and divers, to wit, one hundred bottles of foreign mineral water contained therein, and which said case of foreign water was then in a certain other carriage, to wit, a van, and the said van, together with a horse then attached to the same, were then lawfully standing and being in a certain public and common highway, near to certain premises of the plaintiff, to wit, in order that the said foreign water might be unloaded and taken from the said van, and placed in the premises of the plaintiff: and the said gig of the plaintiff was then also lawfully standing and being in the said highway near to the said premises of the plaintiff, and likewise near to the said van and horse. And the defendant was also then possessed of a certain other carriage, and of divers, to wit, two horses drawing the same, and which said carriage and horses of the defendant were then under the care, government, and direction of a certain then servant of the defendant, who was then driving the same, to wit, unto and into the said highway, and who for that purpose was desirous of passing the said van and horse attached to the same, with the said carriage and horses of the defendant: nevertheless, the defendant then by her said servant, so carelessly, injudiciously, unskilfully, and improperly, drove, governed, and directed her said carriage

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and horses, and so carelessly, injudiciously, and unskilfully and improperly backed and removed, and endeavoured to back and remove the said van and the said horse so attached to the same, and otherwise so carelessly and improperly conducted herself in the premises, that by and through the carelessness, negligence, unskilfulness, and improper conduct of the defendant by her said servant in that behalf, the said van then ran and was forced back towards, upon and against the said gig of the plaintiff, and thereby the said case of foreign water, the contents whereof he, the plaintiff, was then causing to be unloaded from the said van as aforesaid, then fell, and was then cast and thrown with great force and violence from the said van down to and upon the shafts of the said gig of the plaintiff, whereby the said shafts were then crashed and broken to pieces, damaged and destroyed, and divers, to wit, nineteen of the said bottles of foreign water, being of value, to wit, of the value of £2, were then broken and destroyed, and the said last-mentioned water spilled and wholly lost to the plaintiff: and also by means of the premises, the plaintiff was forced and obliged to incur, pay, lay out, and expend, and hath necessarily incurred, paid, laid out, and expended, and become liable to pay divers monies, amounting in the whole to a large sum of money, to wit, the sum of 5*l.* 14*s.*, in and about the repairing of his said gig so damaged as aforesaid." Plea—Not guilty.

It was opened by *Wightman*, for the plaintiff, that on the 2nd of June, 1840, a van which had brought mineral water to the back entrance of the premises of the plaintiff in Little Bruton-street, was unloading, and the plaintiff's gig standing behind it, when the defendant's coachman, with a carriage and a pair of horses, came up from Bruton mews into Little Bruton-street, and the carriage being unable to pass the van for want of room, the defendant's coachman got off his box and took hold of the head of the horse which was in the van, in order to remove the van,

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when a case of mineral water, that a person was taking from the van, fell down on the shafts of the plaintiff's gig, and broke them.

On the part of the plaintiff Thomas Carter was called: he said, "I am a carman and van-owner: on the 2nd of June I was employed by the plaintiff to fetch mineral water, and also to fetch his gig. I did so, and the van and the gig were standing in Little Bruton-street. The gig was a little behind the van, and detached from it. While I was unloading the van, the defendant's carriage came up from Bruton mews. For five minutes the carriage was obstructed, and the coachman desired the van to be moved. I said I would move the van as soon as I got the case into the premises. The coachman said he was not going to wait there, and jumped down from his coach-box and took the horse of the van by the head; this caused the van to move, and the case fell down on the shafts of the gig and broke them."

GURNEY, B.—Can you carry this any farther? I think this is not enough to charge the defendant.

Wightman, for the plaintiff.—The coachman was driving, and left his box merely to remove the van. It was done in the course of his employment. His being off his box makes no difference. Suppose he had been a carter, his employer would be equally liable, and yet carters are almost always on foot.

GURNEY, B. (having conferred with the other learned Barons who were sitting in the Exchequer Chamber),—I am of opinion that the coachman was not acting in the employ of his mistress at the time that this matter occurred, and that the defendant is therefore not liable in this action. The plaintiff must be nonsuited.

Nonsuit (*a*).

(*a*) See the case of *Sleath* v. *Wilson*, *ante*, p. 607.

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LAMB v. PALK.

Wightman and *Taprell* for the plaintiff.

R. V. Richards for the defendant.

[Attornies—*G. J. Nicholson* and *Austen & Hobson.*]

MACKENZIE *v.* COX.

Dec. 1*st.*

If A. place a dog with B., and the dog be received by B., to be kept by him, for reward to be paid to him by A., B. is not answerable for the loss of the dog if he took reasonable care of it; but if the dog be lost, the onus lies on B. to acquit himself by shewing that he was not in fault with respect to the loss.

CASE.—The declaration stated, that the plaintiff, at the request of the defendant, delivered to the defendant divers, to wit, three dogs of the plaintiff, "to be by the defendant kept, fed, and taken care of, for reward to the defendant in that behalf; and the defendant then had and received the said dogs for the purpose aforesaid; yet the defendant, not regarding his duty on that behalf whilst he had the dogs for the purpose aforesaid, to wit, on, &c., took so little and such bad and improper care of the said dogs, that by and through the negligence, carelessness, and improper conduct of the defendant in that behalf, one of the said dogs became and was wholly lost to the plaintiff." Pleas—first, not guilty, and, second, that the defendant did not receive the dogs, or either of them, to be taken care of for reward (*a*).

On the part of the plaintiff, it appeared that three dogs of the plaintiff were put into the stables of the defendant, who was a livery-stable keeper, and that his ostler was paid money to buy them food, and that one of the dogs was afterwards lost; but no evidence was given on the part of the plaintiff as to how the loss of this dog had occurred.

(*a*) As the form of this plea may be useful in practice, we have subjoined it. "And for a further plea on this behalf, the defendant says, that the plaintiff did not cause to be delivered to him, the defendant, nor did the defendant have or receive the said dogs in the declaration mentioned, or any or either of them to be by him, the defendant, fed, kept, or taken care of for reward to the defendant in that behalf, in manner and form as the plaintiff hath in the declaration above alleged; and of this the defendant puts himself upon the country, &c."

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On the part of the defendant it was proved, that before the dogs were placed in the defendant's stable the plaintiff said to the defendant that he had a horse and three dogs which he wished to place with him, and that the defendant replied, that he did not take in dogs, but he should have no objection to the dogs being with the horse; and that on the plaintiff asking whether the dogs would be safe, the defendant replied that he had never lost anything, and referred the plaintiff to the ostler. With respect to the loss, it was proved by the defendant's ostler, that on the evening of the night on which the dog was lost, he locked it up in the stable, and that he missed it between twelve and one o'clock on that night, the stable-door having been opened by a false key; and this witness further stated, that he gave immediate information of the loss.

Shee, Serjt., in reply.—If a person has goods left with him without reward, he is only bound to take such care of them as he would take of his own; but if they are placed with him for hire, he must prove to your satisfaction that he took every care of them which a person reasonably could take.

GURNEY, B. (in summing up).—In this case, the plaintiff must make out to your satisfaction that this dog was received by the defendant for reward to be paid by the plaintiff to the defendant; and if that be made out to your satisfaction, the next question is, whether the defendant has been negligent. With respect to the first question, evidence was given on the part of the plaintiff, that the dogs were placed at the defendant's stable; but no evidence was given on the part of the plaintiff, as to the manner in which the dog was lost, the onus being on the defendant to acquit himself, by shewing that he was not in fault with respect to the loss of it. The defendant has adduced

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evidence on both questions, and has called witnesses to show that the dog was not received for reward, and that the stable was entered by a false key; and even if a person does take goods into his possession for reward, he is not answerable for their loss if he takes reasonable care of them; and it is for you to say, whether, locking these dogs into a stable, was not taking reasonable care of them; and if you think that it was, and that a dog-stealer came in the night and stole this dog, then the defendant is not answerable for the loss. You will consider on the whole of the evidence that has been given; first, whether the defendant received the dogs for reward to be paid him; and secondly, whether this dog was lost by the negligence of the defendant.

Verdict for the defendant on both issues.

Shee, Serjt., and *R. Gurney*, for the plaintiff.

Platt, and *F. V. Lee*, for the defendant.

[Attornies—*M'Beath* and *Dungerfield*.]

GIBBONS *v.* POWELL.

Dec. 1*st*.

In a town cause, a notice to produce a paper that would be in the hands of the opposite attorney, was served at 8 p. m. on the evening before the trial, at his office on one of his clerks, who had the management of the cause:—*Held*, that the service was not too late, and the paper not being produced, secondary evidence was given of its contents.

DEBT for goods sold. Plea, nunquam indebitatus.

On the part of the plaintiff it was proposed to call for the copy of the writ of summons served on the defendant in this action, with a view of proving an admission made at the time of the service of it.

It was proved that the notice to produce it was served at the office of the defendant's attorney, at eight o'clock on the evening before the trial, and was served on a clerk of the defendant's attorney who had attended several summonses in the cause; and it was also proved that the de-

fendant's attorney lived in Chancery-lane, and the defendant himself in Carpenter-street.

Butt, for the defendant.—I submit that the service of the notice was too late.

Ball, for the plaintiff.—It is to produce a paper that the attorney must have.

Butt.—In the case of *Byrne* v. *Harvey* (*a*), the notice to produce was served at half-past seven, on the evening before the trial, at the house at which one of the defendant's attornies lived, and where both had their offices, and Lord *Denman*, C. J., held that it was served too late (*b*).

GURNEY, B.—What was that, a notice to produce?

Butt.—It was a letter.

GURNEY, B.—That would very probably be with the client. This the attorney would certainly have.

Butt.—The party is personally served with the writ.

GURNEY, B.—But he always gives it to his attorney. As I think it is a thing that the attorney must have, I shall receive the evidence.

The evidence was received, but evidence was also given of the actual delivery of the goods.

Verdict for the plaintiff.

(*a*) 2 M. & Rob. 89.

(*b*) In that case, Lord *Denman*, C. J., said, "he thought the notice was not served in sufficient time to allow the attorney to *communicate with his client* for the purpose of *procuring* the letter; and his Lordship refused to receive the secondary evidence." See the cases of *Holt* v. *Miers*, *ante*, p. 191, *Firkin* v. *Edwards*, *ante*, p. 478, and *Foster* v. *Pointer*, *post*.

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Ball, for the plaintiff.

Butt, for the defendant.

[Attornies—*Paine & H.*, and *G. Smith.*]

BEFORE LORD ABINGER, C. B.

PEGG *v.* STEAD.

Dec. 3rd.

A plaintiff declared specially in assumpsit, that in consideration that the plaintiff had sold and delivered twenty tons of best Dutch lead to the defendant, the latter had promised to deliver to the plaintiff prussiate of potash to the same amount, and the plaintiff averred the delivery of the twenty tons of best Dutch lead, and stated as a breach that the defendant would not deliver the full quantity of potash. The defendant pleaded non assumpsit:—*Held*, that as the defendant had not pleaded that the plaintiff had not delivered best Dutch lead, he could not go into evidence to shew that the lead was of inferior quality.

On a count for a quantum valebant the plaintiff may give evidence of an agreed price for the goods, and the defendant on a plea of non assumpsit may also go into evidence to induce the jury not to give that price, by shewing that the articles delivered were inferior to those that the price was agreed to be paid for.

ASSUMPSIT.—The first count of the declaration stated, "whereas, heretofore, to wit, on &c., in consideration that the plaintiff, under the name and style of Robert Pegg & Co., at the request of the defendant, had sold to the defendant twenty tons of best Dutch lead, at the price and sum of five guineas per ton, five per cent. discount, to be delivered free in the stream; the amount to be taken out in prussiate potash at 15*d.* per pound, delivered free on board; he, the defendant, then promised the plaintiff, under the name and style aforesaid, to deliver to the plaintiff free on board, prussiate potash at 15*d.* per pound, 2½ per cent. discount, to the amount of the price of the said twenty tons of the best Dutch lead, at five guineas per ton, 5 per cent. discount: And the plaintiff further saith, that, although he, the plaintiff, did deliver to the defendant free in the stream twenty tons of the best Dutch lead at five guineas per ton, 5 per cent. discount; and although he, the plaintiff, hath been from the time of the making of the contract and promise by the defendant, until the commence-

ment of this suit, ready and willing to take out the amount of the aforesaid price of the said twenty tons of best Dutch lead in prussiate potash at 15*d.* per pound, 2½ per cent. discount, and to receive the same, when delivered free, on board: and, although the price of the said twenty tons of the best Dutch lead, at five guineas per ton, 5 per cent. discount, amounted to a large sum of money, to wit, to the sum of £100; and although the quantity of prussiate potash at 15*d.* per pound, 2½ per cent. discount, which would amount to the aforesaid price of the said twenty tons of best Dutch lead, would amount to a large quantity, to wit, 1700 lbs. of prussiate potash: Nevertheless, the plaintiff saith, that, although a reasonable time for the delivery of the aforesaid quantity of prussiate potash had elapsed long before the commencement of this suit, yet the defendant did not, nor would deliver to the plaintiff free on board, nor in any other way whatever, the said 1700 lbs. of prussiate potash; but, on the contrary thereof delivered a smaller and much less quantity, to wit, 157 lbs. of prussiate potash, only amounting to 9*l.* 16*s.* 3*d.* of the said price of said twenty tons of best Dutch lead, so sold and delivered by the plaintiff to the defendant as aforesaid, contrary to the contract and promise of the defendant, so made by him in that behalf, as aforesaid." There were also counts for goods sold, and upon an account stated. Plea—Non-assumpsit.

On the part of the plaintiff, a freight note, signed by the defendant, of which the following is a copy, was put in and read:—

"Bought of Robert Pegg & Co. twenty tons of best Dutch lead at 5*l.* 5*s.*—5 disc., delivered free in the stream, the amount to be taken out in prussiate potash at 15*d.*—2½ dis. deld. free on board.

"13 Feb. 1840. "JNO. STEAD."

Erle, for the defendant.—I am prepared to shew, that

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the lead, though very good at the top of the casks was inferior in the middle.

Lord ABINGER, C. B.—If that be so, you must bring a cross action.

Erle.—In the case of *Street* v. *Blay* (*a*), and also in the case of *Chanter* v. *Hopkins* (*b*), a single specific article had been sold; and if in this case the article to be delivered by the plaintiff had been a single article, perhaps the defendant might be driven to a cross action; but I submit that that is not so, where it is an article in bulk which the defendant could not see when the contract was made.

Lord ABINGER, C. B.—It would be as you say in an action for goods sold: but this is an action on a specific contract; and you, by your plea, only deny the making of the contract. If you had meant to insist that the contract was void by reason of the non-delivery of the lead, you should have pleaded it.

Erle.—*Chanter* v. *Hopkins* was an action for goods sold.

(*a*) 2 B. & Ad. 456. From that case it seems that the purchaser of a *specific chattel* under warranty, having once accepted it, cannot return the chattel, or resist an action for the price, on the ground of breach of warranty, unless in case of fraud *or* express agreement authorizing the return, *or* consent of the vendor.

(*b*) 4 M. & W. 399. In that case the defendant had, by a written order, ordered of the plaintiff a smoke-consuming furnace for his brewery. The furnace was sent and put up in the brewery, and in an action of assumpsit for the price which had been agreed upon, (in which the defendant pleaded non assumpsit,) it was found by the jury that the smoke-consuming furnace was useless to the defendant for his brewery; but the Court held, that plaintiff was entitled to recover the full price, no fraud being imputed to him, inasmuch as the order was for a specific defined article which was furnished, and that no warranty that it should answer the required purpose could be imported into the contract.

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Lord ABINGER, C. B.—On a count for goods sold you could go into the value of the goods; but in this declaration, which is on the special contract, they aver a delivery of goods, and you only plead non-assumpsit. You should have pleaded, that the lead was not delivered to the value averred, and that you therefore were not bound by the contract. The plaintiff has a right to say, that, on these pleadings, he was not prepared to meet this point, more especially if you never returned the lead.

Erle.—The lead has not been returned.

Lord ABINGER, C. B.—On a quantum valebant the plaintiff might have given evidence of an agreed price for the goods; and you would have been let in to say, that the jury should not give that price, because the article was inferior to the one that the price was agreed to be paid for: but as this declaration is framed on the contract, I could not allow you to give that evidence unless you had pleaded that the contract was avoided by the non-delivery of the lead according to its terms.

Verdict for the plaintiff on the first issue, and for the defendant on the other issues.

Kelly and *Selfe* for the plaintiff.

Erle for the defendant.

[Attornies—*J. Bennett* and *J. S. Wheatley*.]

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RICHES and Another *v.* EVANS, Esq. and WHEELTON, Esq., Sheriff of Middlesex.

Dec. 3rd.

If a person, expecting a fieri facias will be sued out against him, make an assignment by deed of his goods to trustees for the benefit of his creditors, and the goods be afterwards taken under the fieri facias, and an action of trover for them be brought against the sheriff by the assignees, it will be a question for the jury under all the circumstances, whether the deed was fraudulent or not, that is, whether it was bonâ fide meant to convey the goods to the trustees for the benefit of the creditors generally, or whether it was a pretext only, and the goods were, notwithstanding the deed, really to belong to the assignor, and this is a question of fact, and not a question of law.

The fact that a deed of this kind was executed with intent to avoid a particular execution, does not in point of law make it void, neither will the fact of the assignor remaining in possession, according to the terms of the deed, set it up if the jury think that the deed was a fraud.

TROVER for horses and carts. Pleas,—first, not guilty, Second,—a denial of the property of the plaintiffs.

It appeared that the goods in question, which consisted of seventeen horses and several carts, had belonged to a person named Stansby, and had been taken by the defendants under a writ of fieri facias, which had been sued out against Stansby by a person named Hart. It further appeared that Mr. Hart obtained a judgment for £30 and costs, against Mr. Stansby (who was a wharfinger) on the 6th of September, 1840, on which execution was stayed for ten days, on an application by Mr. Turner his attorney, to set it aside; the judgment being ordered to be set aside if the costs were paid in ten days; and that on the 14th of that month Stansby executed a deed of assignment between himself of the first part, the plaintiffs of the second part, and the plaintiff Riches and the other creditors of Stansby, who should execute this deed of the third part; and by this deed Stansby assigned all his goods and effects to the plaintiffs as trustees for the benefit of his creditors, and they were to take possession, and by writing under their hands to allow Stansby till breach of the covenants, to continue in possession of the horses, carts, and household furniture; and this deed also contained a covenant by Stansby to pay all his creditors who executed this deed 10*s.* in the pound, at three, six, nine, and twelve months; and there was a proviso, that if he did so, then the deed should be void. And there was also a covenant by the creditors, that they would not sue Stansby, unless he made default; and it was further provided, that, if Stansby did not pay the instalments, the trustees should take possession of all the goods, &c., and do so.

It was proved that Stansby remained in possession of the horses and carts till they were taken by the sheriff on the 17th of September, 1840.

Thesiger, for the plaintiffs, cited the case of *Martindale* v. *Booth* (*a*).

Humfrey addressed the jury for the defendants.—The case of *Martindale* v. *Booth* only decides that the jury having found that a deed was not fraudulent, the Court would not hold the deed to be absolutely void, as matter of law. The possession here was not consistent with the deed. The plaintiffs' right, by writing under their hands, allow Stansby to remain in possession, but there was no such writing; and if this execution had not come in, no one would ever have heard of the deed. I admit that if you are satisfied that this deed was honestly and *bonâ fide* meant to pass this property to the trustees, the plaintiffs are entitled to recover in this action; but I submit to you that the property was all along intended to continue Stansby's, and that this was a mere device to defeat Mr. Hart's execution; and in addition to that, even supposing the terms of the deed to be acted up to, Mr. Stansby protects his goods from executions, pays all his creditors off with 10*s*. in the pound, and then has all his goods back clear of every thing.

Lord ABINGER, C. B. (in summing up).—The plaintiffs

(*a*) 3 B. & Ad. 498. In that case Mr. Justice J. *Parke* said, "It is evident that the bill of sale in this case, without delivery, conveyed the property in the household goods and chattels to the plaintiffs. It may be a question for a jury whether, under the circumstances, a bill of sale of goods be fraudulent or not;" and Mr. Justice *Patteson* said, "There is no sufficient authority for saying that the want of delivery of possession absolutely makes void a bill of sale of goods and chattels. It was held in *Martin* v. *Podger* [2 Sir W. B. 701], that want of possession was a badge of fraud which ought to be left to the jury. Then if it be a badge of fraud only, in order to ascertain whether a deed be fraudulent or not, all the circumstances must be taken into consideration."

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in this case, contend that the goods were not the goods of Stansby, as he had conveyed them to the plaintiffs. It appears that a person named Hart had a judgment against Stansby for £30 and costs, making together above £50; which sum Stansby was capable of paying, as he had seventeen horses. I think also that it cannot be doubted that this deed was executed because Hart was coming in with an execution: as Mr. Turner gets ten days' time, which expired on the 15th of September, the sheriff would come in on the 16th, and this deed was executed on the 14th; and the object no doubt was to get the deed executed before the execution was sued out. But still the law does not prevent a man from conveying his goods away to avoid a judgment; and a man may very honestly do so in many cases, as he may wish his property to be given equally among all his creditors, and not for one to take every thing; and the intent to avoid an execution does not in point of law make a deed of this kind void. The party remains in possession: that in some cases is provided for by the deed; but where the possession is according to the deed, that will not set up the deed, if the jury should think that the deed was a fraud. Here the original defendant, Stansby, is carrying on his business as usual, and had contracted to pay 10*s.* in the pound to his creditors at three, six, nine, and twelve months; and by the deed he is to keep his goods, and if he pays the instalments, the property is to be restored to him. You will say whether this was a *bonâ fide* deed, intended to part with the property, and to convey it to the trustees for the benefit of the general body of creditors; for if it was, the plaintiffs are entitled to your verdict; but if you think, from the circumstances, that Stansby was to keep possession and to have his goods back again, that this was all a pretext to keep off this execution, and that Stansby was really to have the goods all along, you ought to find for the defendants. There is no question of law in it; and it is a question for you under all the circumstances to determine whether this

deed was meant bonâ fide to convey the property to the trustees (*a*).

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Verdict for the plaintiffs.

Thesiger and *Ogle* for the plaintiffs.

Humfrey and *Rawlinson* for the defendant.

[Attornies—*H. J. Turner* and *Kilgour & Parsons.*]

In the ensuing term, *Humfrey* moved for a new trial, but the Court refused a rule.

(*a*) See the case of *Burling* v. *Paterson*, ante, p. 570.

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Dec. 4th.

The general rule is, that a wife cannot bind her husband by her contract except as his agent; but in cases of orders given by the wife in those departments of her husband's household which she has under her control, or of orders for articles which are necessary for the wife, such as clothes, the jury (if the wife be living with the husband) ought to infer agency, if nothing appear to the contrary; but if the order is excessive in point of extent, and such as the husband never would have authorized, that will alone be sufficient to repel the inference of agency.

If it be proved that the wife has a separate income, that of itself goes to repel the inference of agency; and evidence that the plaintiff has made out the invoices to the wife, and has drawn bills of exchange on her for part of the amount, which she has accepted in her own name, payable at her own bankers from her separate funds, also goes to prove that the wife was not acting as the agent of the husband; and the fact that the husband sold some of the goods which were supplied to the wife and received the money for them, will not of itself make the husband liable in point of law to pay for them; but it is a fact for the consideration of the jury in determining whether the goods were supplied on the credit of the husband, and whether the wife was the agent of her husband.

DEBT for goods sold and delivered, with counts for money paid, money had and received, and upon an account stated. Plea—Nunquam indebitatus.

It appeared from the evidence given on the part of the plaintiff, that the plaintiff, Mrs. Freestone, was a dealer in foreign birds, carrying on business in St. Martin's-lane, London; and that the defendant, the Rev. Dr. Butcher, was curate of Milton, near Northampton, and residing at the rectory house at that place. The present action was

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brought to recover a balance amounting to 757*l.* 0*s.* 6*d.* for live foreign birds supplied to the defendant's wife, from the 20th of February, 1839, to the 23rd of December in the same year. The original amount of the plaintiff's demand had been 959*l.* 16*s.* 6*d.*, of which a sum of 202*l.* 16*s.* had been paid at different times by the defendant's wife.

It was proved, that the defendant and his wife were living together at the rectory house at Milton, and that the defendant had caused a room to be fitted up as an aviary; and it was also proved, that the birds which had been sent by the plaintiff by coach, and had been delivered at the defendant's house, were between six and seven hundred in number, mostly foreign, consisting of lories, avadavats, love birds, bishop birds, cardinals, quakers, cut-throats, manakins, &c., many being of the same species.

It was also proved, that, in the month of March, 1840, Mr. Read, a dealer in birds, (in consequence of an application from Mr. Ball, of Northampton), went to the defendant's house and saw the birds, when the defendant offered to sell them to him for £200, and that, after some negotiation, Mr. Reed bought a portion of them from the defendant, consisting of fifty love birds, twelve cut-throats, three blackheaded manakins, twelve cardinals, twelve mountain lories, and other birds, to the number of about 200, for the sum of £110, of which sum he paid £64 to the defendant, and left the remaining £46 in the hands of Mr. Ball; but there was no evidence to shew that Mr. Ball had paid the £46 to the defendant. A letter, sent by the defendant to Mr. Read, was also put in; it was in the following terms:—

"Milton, Friday Evening.

"Sir,—Finding that you have left without paying the remainder of the money due for the birds, I write to say, that unless it is paid in full to my credit, at the bank of Messrs. Drummond, Charing-cross, London, before twelve o'clock to-morrow morning, my solicitors are directed to issue a writ against you immediately for the amount. The

sums paid were £50 yesterday and £14 to-day, leaving a balance of £46 due.—Your obedient,

E. R. BUTCHER."

It was opened by Sir *F. Pollock*, for the defendant, that Mrs. Butcher had a separate income of her own, over which her husband had no control, and that she kept a separate banking account of her own with Messrs. Drummond, as her bankers; and that the plaintiff had dealt with Mrs. Butcher on her own separate account, and not on the credit of the defendant, as all the accounts and invoices were headed "Mrs. Dr. Butcher;" and the plaintiff had drawn bills of exchange on Mrs. Butcher, which were accepted by her in her own name, and paid at her bankers, Messrs. Drummond, from her money in their hands.

Kelly, for the plaintiff.—I submit that the bills of exchange, accepted by Mrs. Butcher, can hardly be evidence. The plaintiff was no doubt glad to get paid by any one.

Lord ABINGER, C. B.—The husband is sought to be charged, because the wife was the husband's agent. That may be proved by circumstances. Other circumstances may shew that she was not so. Mr. Kelly has shewn facts from which a jury may infer that the husband was credited, and, to repel this inference, evidence may be given of a separate income, and of the wife accepting bills in her own name. I shall tell the jury, that if this lady had a separate income, and the plaintiff was taking bills with her acceptance, they as men of sense must see that the plaintiff was dealing with the wife and not with the husband.

On the part of the defendant, the general account of the plaintiff was put in, it was headed "Mrs. Dr. Butcher;" and twenty-four invoices headed in the same way were also put in, and also several bills of exchange, drawn by the

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plaintiff on Mrs. Butcher and accepted by her, payable Messrs. Drummond's, and there paid from Mrs. Butche separate funds.

The marriage settlement of Dr. and Mrs. Butcher, dat the 21st of October, 1823, was put in, and by it the int rest of £2,500 was secured to Mrs. Butcher's separate u and another deed of settlement, dated the 23rd of Febr ary, 1837, was also put in.

Kelly.—Mrs. Butcher had altogether about £380 a-ye without the control of her husband.

Sir *F. Pollock*.—Dr. Butcher has an income of £49 year, under an order of the Court of Chancery, for t maintenance of his children, and he has £400 a year his own.

It was proved that Mrs. Butcher had a separate banki account at Messrs. Drummond's, and a separate pass bo and that she drew checks on that firm, which were p from her separate funds in their hands.

Kelly, in reply, cited the case of *Waithman* v. *Wa field* (*a*).

(*a*) 1 Camp. 120. In that case Lord *Ellenborough* said, "Where a husband is living in the same house with his wife, he is liable to any extent for goods which he *permits* her to receive there; she is considered as his agent, and the law implies a promise on his part to pay the value. If they are not cohabiting, then he is in general only liable for such necessaries as, from his situation in life, it is his duty to supply her. But even where they are parted, if the husband has any control over goods improvidently ordered by the wife, so as to have it in his power to return them to the vendor, and he does not return them, or cause th to be returned, he adopts her and renders himself answera Nor is it any excuse in law the wife is unmanageable or d bedient, as he must be suppose exercise his marital rights an regulate her conduct." "Ag however low a man's circumsta may be, if he allows his wif assume an appearance which h unable to support, he is answer for the consequences. Whe tradesman is thereby deceived, loss must fall on him who conni at the deception." "Howeve is the duty of tradesmen to m inquiries before trusting a mar

Lord ABINGER, C. B.—In that case Lord Ellenborough thought the husband not liable, but the jury found against his opinion.

Kelly.—There is no case which decides that a husband is not liable where his wife is living with him.

Lord ABINGER, C. B. (in summing up).—The general rule is, that the wife cannot bind her husband by her contract, except as his agent. There are, however, cases in which a jury may infer such agency. In the cases of orders given by the wife in those departments of her husband's household which she has under her control, the jury may infer that the wife was the agent of her husband till the contrary appear. So, for such articles as are necessary for the wife, such as clothes, if the order is given by the wife, and she is living with her husband, and nothing appear to the contrary, the jury do right by inferring the agency; but if the order is excessive in point of extent, or if, when the husband has a small income, the wife gives extravagant orders, these are circumstances from which the jury would infer that there was no agency. The tradesman who supplies the goods takes the risk; and if the bill is one of an extravagant nature, such as the

woman who is a stranger to them, and the plaintiffs do not seem to have taken the pains they were bound to do to ascertain the defendant's responsibility. Therefore, as they have trusted his wife for want of information, which might easily have been obtained; if they receive a verdict at all, their demand should be reduced to the charge for necessaries suitable to the circumstances of the defendant." "The jury notwithstanding gave the plaintiff a verdict for the full sum." See the cases of *Montague* v. *Espinasse*, ante, Vol. 1, pp. 356, 502; *Houliston* v. *Smyth*, ante, Vol. 2, p. 22; *Mainwaring* v. *Leslie*, Id. p. 507; *Clifford* v. *Laton*, ante, Vol. 3, p. 15; *Reed* v. *Moore*, ante, Vol. 5, p. 200; *Dennys* v. *Sargeant*, ante, Vol. 6, p. 419; *Atkins* v. *Curwood*, ante, Vol. 7, p. 756; *Spreadbury* v. *Chapman*, ante, Vol. 8, p. 371; *Mizen* v. *Pick*, Id. p. 373, n.; *Emmett* v. *Norton*, Id. p. 506; *Hardie* v. *Grant*, Id. p. 512; *Dixon* v. *Hurrell*, Id. p. 717.

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husband would never have authorized, that would alone sufficient to repel the inference of agency. In a late case tried before me (*a*), it appeared that the defendant, a gentleman of the legal profession, had a very limited income, and that his wife incurred debts for millinery to an extravagant amount, and there the jury found that there was no authority on the part of the husband to contract the debt, and I think that they were quite right in so finding. The plaintiff in each of these cases has the onus cast upon him, and he is bound to prove that the goods were supplied on the credit and by the authority of the husband. The cases which I have put, as those in which the jury would infer the authority, are those, where, in the ordinary course of things, the wife would give the orders; but if the wife ordered five puncheons of rum and five hogsheads of sugar, you would not infer agency, even if she had accepted a bill of exchange for the amount. Here you have a married woman ordering, in about ten months, £900 worth of fancy birds. If the thing is out of the ordinary course juries ought to insist on strict proof. It is proved that the birds were delivered at the defendant's house, and in addition to that, the only evidence is, that the defendant sold some of the birds, and wrote a letter respecting the payment of the price of them. That is evidence which is certainly for your consideration, yet it is in its nature ambiguous; for if Mrs. Butcher had ordered these goods and paid ready money for them, the defendant would have been entitled to sell them and take the price of them. You must say whether that satisfies you that he gave authority to his wife to buy them. It is proved that his income is £ a-year, and that he prayed an allowance from the Court of Chancery for the maintenance of his children, upon which an allowance was granted, which is never done unless it be shewn that the husband has not a sufficient income to maintain his children without such an allowance, and

(*a*) The case of *Atkins* v. *Curwood*, ante, Vol. 7, p. 756.

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alone would be enough to shew that avadavats and mocking birds were not necessaries for his wife. It is proved that Mrs. Butcher has a separate income of about £380 a-year. Now, if it be shewn that the wife has a separate income, that by itself goes to repel the inference of agency. It has been said that the defendant allowed his wife to buy these birds; however, if the defendant had objected, Mrs. Butcher had a right to say, 'I have the money in my own power, and it is not to be under your control;' and that being so, if Dr. Butcher, knowing that his wife liked birds, had fitted up an aviary for her, it would not shew that he meant also to pay for all the fancy birds that were to be put into it. It might go a great way to shew agency if the wife had no separate income, but she having a separate income, it proves nothing as to the agency with respect to the buying of the birds. It is said, 'Why did not Dr. Butcher stop his wife from buying them?' Why should he, as she had separate means? If he knew that she was running in debt, no doubt he ought to have remonstrated with her, but what evidence is there that he made her his agent to buy all these birds? To whom did the plaintiff address the invoices? To "*Mrs. Dr.* Butcher." The term "*Mrs. Dr.*" shews that the plaintiff knew that Mrs. Butcher was married. The plaintiff draws bills of exchange on this married woman, and the married woman accepts them in her own name, payable at a banker's where she keeps a separate banking account, and where they are paid out of her separate funds. Is there anything to shew that the plaintiff was not dealing with a married woman on the credit of that married woman herself? It is the bounden duty of tradesmen, when they find a wife giving extravagant orders, to give notice to the husband immediately, if they mean to hold him liable. The case then comes to this, did the plaintiff deal with Mrs. Butcher on the credit of her husband, the defendant? The plaintiff makes out the invoices and accounts to Mrs. Butcher, and draws bills of exchange for Mrs. Butcher to accept; and

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can any man living doubt that the dealing was on the credit of Mrs. Butcher? But it is not enough that the credit was given by the plaintiff to Dr. Butcher the defendant, unless you find also that Dr. Butcher authorized it; and so far from that being proved, there is evidence of a separate provision for the wife, and almost every circumstance which is calculated to repel that inference.

A special juror.—We wish to know whether the husband made himself liable by selling the birds and taking the money for them.

Lord ABINGER, C. B.—If you ask me as matter of law, I think that he did not; it is only a circumstance for your consideration in determining the question, whether, in buying these birds, Mrs. Butcher was acting by the authority of her husband or not. As soon as she had bought these birds they became the property of her husband. There was a late case in which a wife's clothes, bought with her separate income, were seized under an execution against her husband (*a*).

Verdict for the defendant.

Kelly and *Hayes* for the plaintiff.

Sir *F. Pollock*, *R. V. Richards*, and *Busby* for the defendant.

[Attornies—*Kirk* and *Jones & Son.*]

(*a*) The case of *Carn* v. *Brice*, Law Jour. Exch., Vol. 10, p. 28.

Sittings in London after Michaelmas Term, 1840.

BEFORE LORD ABINGER, C. B.

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Dec. 10*th.*

Brooker *v.* Field and Wife.

A private person, who gives another into custody on a charge of having committed an offence against the stat. 7 & 8 Geo. 4, c. 29, (the Larceny Consolidation Act), is not entitled to notice of action under the 75th section of that act, as that section only applies to constables and other officers, and persons of that kind.

FALSE imprisonment.—The declaration stated that Olivia, then being the wife of the other defendant, William Field, assaulted the plaintiff and imprisoned him. Plea, "by statute," by both the defendants; that the defendant Olivia was not guilty.

It was opened by Sir *F. Pollock* for the plaintiff, that Mrs. Field had directed a police constable to take the plaintiff into custody for stealing her cat, she being present at the time the police constable had done so; and that the intended defence was, that the defendants were protected by the 75th section of the statute 7 & 8 Geo. 4, c. 29, the Law of Larceny Consolidation Act, which protected persons acting in the execution of that act. That section, however, did not, (as he submitted), apply to this case, as it applied only to magistrates, constables, and officers, and not to persons who acted voluntarily. The clause of the Bankrupt Act, 6 Geo. 4, c. 16, was quite as general and as strong as the 75th section of the statute 7 & 8 Geo. 4, c. 29, and yet it was held not to apply to any but commissioners and officers. He cited the case of *Cooke* v. *Leonard* (*a*).

It was proved by a police constable named Kershaw, that on the 2nd of September, 1840, he went with Mrs. Field to the house of the plaintiff in Willow-walk, Shoreditch, in the county of Middlesex, when Mrs. Field

(*a*) 6 B. & C. 351.

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BROOKER v. FIELD.

charged the plaintiff with stealing her cat, and directed him to take the plaintiff into custody, which he did.

Whateley, for the defendant.—I submit that the plaintiff cannot recover in this action. If it be shewn that Mrs. Field had reasonable ground to believe that the plaintiff had stolen her cat, by the 75th section of the statute 7 & 8 Geo. 4, c. 29, she would be entitled to notice of action, and to have the venue laid in the proper county.

Lord ABINGER, C. B.—Bonâ fide belief has nothing at all to do with this case. I think that this provision only applies to constables and persons of that kind. If this section of the statute were held to apply to these defendants, it would go to the extent of saying, that every person might give a party into custody for any offence under the statute 7 & 8 Geo. 4, c. 29, and then be entitled to notice of action, to tender amends, and to have the case tried in the particular county in which it arose.

Evidence was given that the plaintiff, before he was taken into custody, had written letters to Mrs. Field, offering to restore her cat for a sum of money, and that the cat had been seen upon his premises.

Verdict for the plaintiff—damages, One farthing.

Sir *F. Pollock*, *C. Phillips*, and *S. Martin*, for the plaintiff.

Whateley and *Montagu Chambers*, for the defendants.

[Attornies—*A. R. Steele* and *J. & W. Sheffield.*]

1841.

Second Sittings at Westminster in Hilary Term, 1841.

BEFORE BARON ROLFE.

STOCKEN *v.* COLLINS.

Jan. 23rd.

ASSUMPSIT by the plaintiff, as indorsee of a bill of exchange for 28*l.* 8*s.* 3*d.*, dated the 24th of October, 1838, drawn by the defendant on a person named Davis, payable eighteen months after date to the order of the drawer. Plea, denying the notice of dishonour. The bill became due on the 27th of April, 1840.

John Turner said:—"I am clerk to Mr. Sydney Smith, who is an attorney in Barnard's Inn; I produce Mr. Smith's letter-book. [The defendant's counsel handed the witness a letter]. This is the letter I put into the post; I put it into the post before one o'clock on the 28th of April."

Mr. Murphy, a clerk to the plaintiff, proved that the defendant lived at 9, Euston Place; and that when he asked for payment of this and another bill, the defendant referred him to his attorney.

The letter (a notice of dishonour) was read: it was post marked 10 FN. 10 AP. 29 1840 The letter commenced—"9, Barnard's Inn, 28th April, 1840. Sir, I am instructed by Mr. Molineux to give you notice that a bill [describing it] has been dishonoured," &c. It was signed, "For Sydney Smith, W. Hayward."

Wordsworth, for the defendant.—I submit that the plaintiff must be nonsuited. The bill became due on the 27th of April, and the notice of dishonour ought to have been given to the defendant on the 28th. The post-office mark

A party being entitled to notice of dishonour of a bill of exchange on the 28th of April, and all the parties living in town, a witness stated that he put a letter containing the notice of dishonour into the post at one o'clock p.m. on the 28th. The post mark on the letter was the 29th:—*Held*, that if the jury were satisfied that the letter was put into the post sufficiently early for the party in the ordinary course of the post to have received it on the 28th, it was sufficient, and that its having been delayed in the post-office would make no difference.

A notice of dishonour, which states that a bill of exchange "has been dishonoured," is sufficient, although it does not state that the bill has been presented.

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STOCKEN v. COLLINS.

on the letter is ten in the forenoon of the 29th of April, and it is, therefore, too late. The question is, not when the notice was put into the post, but when the defendant received it; and, being within the bills of mortality, the defendant was entitled to receive the notice of dishonour on the day after the dishonour of the bill. There is also another objection. According to the opinion of the Lord Chief Justice in the case of *Boulton* v. *Welch* (*a*), the notice of dishonour should state the presentment of the bill, as well as the dishonour.

F. V. Lee, for the plaintiff.—The case cited has been overruled several times: and, with respect to the other point, it should be observed, that the notice purports to have been given on the behalf of Mr. Molineux, and there is no evidence that Mr. Molineux lives in town; but even if there were, it is proved that the letter was put into the post on the 28th of April; and if the defendant means to insist that he did not receive the notice till the 29th, he is bound to shew affirmatively that he, in fact, did not receive it till that day.

Wordsworth.—If the plaintiff seeks to excuse his delay, because Mr. Molineux does not live in town, it lies on the plaintiff to prove that. The notice is dated from Barnard's Inn, which is in town.

ROLFE, B.—I do not think there is anything in the objection as to the form of the notice; and with respect to the other point, the case must go to the jury. You can address the jury if you wish it; but it is hardly necessary.

Wordsworth declined addressing the jury.

ROLFE, B. (in summing up).—If a party residing in

(*a*) 4 Scott, 425.

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London is bound to give notice of dishonour to another person also residing in London, it is enough if he puts the notice of dishonour into the post so early, that, in the usual course of post, the person to whom it is addressed will receive it at some time on the day following that on which the bill is dishonoured. If this letter was put into the post at the time at which the witness says it was, it may have been overlooked in the Post-office, and delayed there, as the Post-office is not infallible. On the other hand, the witness may be mistaken as to the time at which the letter was put into the post. If you think that the letter was put into the post before one o'clock on the 28th of April, as the witness says it was, I think that it is good, and that the plaintiff will be entitled to your verdict; but if the letter was put in at the time which the post-mark denotes, it was too late, and you ought to find for the defendant.

Verdict for the plaintiff.

ROLFE, B.—You think that it was put into the post before one on the 28th?

A juror.—Yes, my Lord.

ROLFE, B.—Mr. *Wordsworth*, I shall give you leave to move to enter a nonsuit, if the Court should think the notice put into the Post-office before one on the 28th was not sufficient.

F. V. Lee, for the plaintiff.

Wordsworth, for the defendant.

[Attornies—*W. Day* and *J. P. Davis*.]

On a subsequent day, *Wordsworth* applied to the Court in pursuance of the leave given; but the Court, after

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citing the case of *Dobree* v. *Eastwood* (*a*), held, that the learned Baron had left the proper questions to the jury, and refused a rule.

(*a*) *Ante*, Vol. 3, p. 250.

MARSHALL *v.* PARSONS.

Jan. 26th.

A. acted under a written agreement as the commission agent of B. in the sale of goods, and was paid a commission. B. was a contractor with the Admiralty for the supply of a variety of articles, on the sale of which A. was paid his commission, and A. attended on a number of occasions at Somerset House, where the patterns of these articles were inspected by the government officers. A. sought to charge B. for these attendances in addition to his commission:—*Held*, that if in giving these attendances A. was only acting in the discharge of his business as an agent, he was not entitled to charge for the attendances; but that if these attendances were matter beyond his duty as an agent, he was entitled to be paid for them separately.

Held, also, that this was a question for the jury.

ASSUMPSIT for "work, journeys, and attendances by the plaintiff, as agent for the defendant, and for commission payable to the plaintiff in respect thereof," with counts for money paid, and upon an account stated. Pleas—Non assumpsit, and a set-off.

It appeared that the defendant was a manufacturer of edge tools at Wolverhampton, and that the plaintiff had acted as his commission agent in London, and that the only real question between the parties was, whether the plaintiff was entitled to recover anything under the following item in his particulars of demand:—

"1839, August 4th.—Attendance at Somerset House, from October 2nd, 1838, to August 4th, 1839, superintending the unpacking, delivery, and examination of patterns, and at return of those rejected; eighty-seven days at 21*s.* per day £91 7 0

It further appeared, that when the plaintiff became the agent of the defendant, the parties entered into a written agreement, dated the 1st day of December, 1837, by which the plaintiff agreed to act as the agent of the defendant for one year, and thenceforth from year to year, until either party should give the other twelve calendar months' notice; and by this agreement the plaintiff was to "use his

best endeavours and exertions to vend, sell, and dispose of the several goods manufactured" by the plaintiff, within the city and seven miles thereof, and "use his best endeavours to obtain information as to the particulars as to any supply of goods in the said trade [of an edge tool manufacturer] which may be required by any government, public or private body or firm," and communicate the same to the defendant, so as to enable him to tender for the same, "which shall be done through the agency of the said William Marshall; and that he will forward to the best of his ability and power the interest of the said John Parsons, his executors, administrators, or assigns, within the limits aforesaid, in selling the articles manufactured by the said John Parsons as aforesaid, and in obtaining payment for the same upon the terms usual in the trade, as to credit or otherwise;" and it was further agreed that the defendant should pay to the plaintiff for all goods sold by him 2½ per cent. on heavy goods [which were specified], and 5 per cent. on all such goods as were not specified, which commissions of 2½ per cent. and 5 per cent. respectively were to be "clear of all charges, expenses, and deductions whatsoever."

It appeared that the defendant was a contractor with the Admiralty for a great variety of articles, and that when any article of a given description was wanted, the defendant had to send seven patterns of the article to Somerset House, which were all to be precisely of the description required, and precisely similar to each other; and such of the seven patterns as were not so, were rejected, and others had to be sent by the defendant in their stead; and it further appeared, that if all the seven patterns of any article were approved, one of them was kept at Somerset House, and one of the other six went to each of the Royal Dockyards, to be compared with the bulk when delivered by the defendant; and it was proved by Mr. Gossage, the inspector of stores, in the Store-keeper

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General's Office, that it was necessary for some person to attend at Somerset House on the behalf of the defendant, whenever the patterns were to be inspected; and it was also proved by Mr. Gossage, that the plaintiff attended at Somerset House about sixty times on this business; and it was also proved, that the usual charge made by a competent person for taking stock was from 10*s*. to 1*l*. 1*s*. per day. It was admitted, that the plaintiff had been paid commission on the goods supplied to the Admiralty by the defendant under his contract, to which the patterns in question referred.

R. V. Richards, for the defendant.—The plaintiff has no right to charge for attendances. An agent who is paid a commission, is not entitled to charge anything for attendance. The commission is his compensation for his trouble; and if it were not paid him as a reward for his trouble, for what is any commission paid at all?

ROLFE, B., (in summing up).—This is an action brought to recover a compensation for the attendances of the plaintiff, made when he was agent for the defendant; and the question for you (and I think it is a question for you) is, whether what the plaintiff did was or was not done in the ordinary course of his business as an agent? The plaintiff had agreed to act as the defendant's agent for certain commission, and you will say whether or not these attendances were in the course of the plaintiff's business as an agent. The witness from Somerset House has told us, that it is necessary for some one to attend when the patterns are inspected; but it appears to me, that these attendances to ascertain whether the patterns are correct, are within the ordinary duty of the agent. If the plaintiff, in giving these attendances, was only acting in the discharge of his business as an agent, he is paid by his com-

mission; but if these attendances were a matter beyond his duty as an agent, he is entitled to be paid for them separately. However, it seems to me, that this is just what an agent does, and is paid for by his commission.

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Verdict for the defendant.

Jervis, and *E. V. Williams*, for the plaintiff.

R. V. Richards, and *Whateley*, for the defendant.

[Attornies—*R. Cheere* and *Manby & Hawksford.*]

Sittings in London after Hilary Term, 1841.

BEFORE MR. BARON GURNEY.

BOSANQUET and Others *v.* FORSTER.

Feb. 13*th.*

A. having been in partnership with B., on the dissolution undertook to collect and pay the partnership debts: A. & B. during the partnership had kept a joint account with a certain Branch Bank; but after the dissolution there was only a single account of A. kept there. A. having greatly overdrawn that account, obtained a promissory note for £500 from B. his former partner, which he indorsed to the bank as a security for his debt, just previous to a quarterly inspection of the accounts of the branch, the clerk who managed the branch promising that it should not be presented. He however kept it, and it was found among the securities of the branch, in his portfolio, when he was discharged from his situation:—*Held*, that the directors of the bank might recover the amount from B.

ASSUMPSIT.—The first count of the declaration was on a promissory note, dated June 8th, 1840, by which the defendant undertook, two months after the date, to pay to one Chipperfield the sum of £400, and which note was stated in the declaration to have been indorsed by Chipperfield to the plaintiffs.

The second count was on a promissory note between the same parties for £500, and was dated January 1st, 1840, and made payable at three months after the date.

The defendant pleaded to the first count, that the £400 note was given by the defendant for the accommodation of Chipperfield, and that no consideration for it passed between Chipperfield and him, and also that Chipperfield

cond count, and which was dated the 1s
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The affirmative of the issues being on
Erle began by stating his case. It appe
plaintiffs were the directors and trustees ha
agement of the affairs of the London a
ster Bank, which bank had a branch
Whitechapel, which was under the superi
person named Rees. Chipperfield kept an
which was overdrawn to a very large amount
the practice of the bank for inspectors to
accounts of the branch quarterly, Chippe
over to Rees, who was his friend, variou
notes and checks, to be produced as securit
inspectors, and afterwards given back to
The promissory notes sued on in this acti
among the bank papers, in the possession
he was discharged.

Chipperfield was called as a witness for t
and gave the following account of the transac
once in partnership with the defendant, a
him to give me the note (the £500 note),
January, 1840; no value was given for it.
deposited at the bank; it was to be given to
sideration of my account being overdrawn.
the defendant he should not be called upon
gave him my cheque for the amount as a cou

—it was safe. When the £500 note had been due about two months, the £400 note was given to Rees, on an agreement that the £500 note should be given up, and I told the defendant this when I got the £400 note from him. I did not at the time ask Rees to give it up, but did shortly afterwards. I saw the £400 in Rees's possession after he quitted the bank; it was not then due; he had only had it a few days. He was dismissed a few days after the 8th of June; I then applied to him for it, but he would not give it up." On his cross-examination the witness said—"The £500 note was given to be placed to my account in January and March. I judged it was for the purpose of being exhibited to the Directors when they came round, to cover the account. Both notes were not allowed to remain in Rees's hands, to be exhibited as assets in my favour, but only one. After the dissolution of the partnership between the defendant and me, an account was opened with the bank in my name only; the partnership account was closed at the dissolution, which was in June, 1838. The partnership funds received by me were included in my private account. I received and paid the partnership monies. The defendant had a private account there. The balance against me in my account was for debts due from the old firm, and the first note was paid in against that balance." On his re-examination he said, "I was to receive the partnership accounts, and pay the partnership debts, but the defendant had nothing to do with my separate account at the bank; but I used the money only for the liquidation of the partnership accounts of Chipperfield & Forster."

Rees was also called as a witness for the defendant, and said, "There was no general agreement when Chipperfield handed the note for £500 to me that I would return it, but I afterwards promised to return it. I expected another £500 note for the first £500 note, but, instead, a £400 note only was sent. I was to retain the £400 note for a

he said, " In January, 1840, Chipperfield
nearly £4,000, and that balance increased a
on. I certainly understood, when the £400
that it was sent in substitution of the £5
never accounted to the bank for it, nor
credit of Chipperfield at the bank; I retain
had no authority from the directors to giv
note, or to substitute the £400 note for it
examination he said, " I had authority t
curities I could."

Erle, for the defendant.—Great injustice
the plaintiffs are only bound to adopt the ac
in part, and not throughout. The questic
two comparatively innocent parties is to s
misconduct of a third. I say, the party
into the situation to commit the misconduc
verdict is for the plaintiffs, will be prejudicia
ter, the defendant. But there is this furth
which arises on the third plea. Can it be s
having accepted one note in substitution for
bank can sue upon both notes? If there w
promise made by the agent, by whose hand
whose means the principals obtained th
surely they cannot sue upon it afterwards.
must stand in the same situation as the age
be in a better. As to a counter cheque giv

not. The plaintiffs adopt the acts of Rees, and they must adopt them in toto.

Platt, for the plaintiffs.—The value for the £500 note was the loan from the Bank Loan Fund to Chipperfield. The principal is only responsible for the acts of his agent within the scope of his authority. A groom would not have authority to sell his master's horse, or let his master's stables; and, in this case, Rees has no authority to cheat his employers. There is no defence as to the £500 note; and, as to the £400, I contend that it was never substituted for the £500 note, and the possession of it is primâ facie evidence of consideration; and the only plea here as to that note, is, that it was given without value. How is the presumption of value broken in upon in this case? Only by the evidence of Chipperfield, who is an interested witness. As to the argument about two innocent parties, Forster, the defendant, must have known the state of the account when he gave the notes, and therefore he cannot be considered as an innocent party. I also submit, that Chipperfield and Rees are not persons whose testimony is to be relied on; and the finding of the £400 note among the bank securities, is sufficient to entitle the plaintiffs to sue upon it. Besides this, the statement of the witnesses with respect to that note is not in itself at all a probable statement.

GURNEY, B., after stating the pleadings, in summing up said—As to the £500 note, it appears that it was obtained from Forster by Chipperfield, who had been in partnership with him, and had undertaken to collect and pay the partnership debts. I think, therefore, that it was not given without value, because it was given to reduce the balance, which balance was brought about by the payment of the partnership debts. And with respect to the bank, there was clearly, from the state of the account, a

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BOSANQUET v. FORSTER.

consideration by them for the note. Then, as to the £400 note, that stands upon a very different ground from the other. It appears that it was not, in fact, substituted for the £500 note, as it does not appear that it was ever carried to the account of Chipperfield. Rees says that it never was, and if he speaks untruly the plaintiffs could prove it, as they are in possession of the accounts. And if it was given on the terms stated by the witnesses, then there was no consideration for the indorsement of it to the bank, and the plaintiffs will not be entitled to your verdict so far as that note is concerned. As to the £500 note, it is quite clear in point of law, as well as in point of honesty, that the plaintiffs are entitled to recover.

Verdict for the plaintiff on the £500 note, and on all the issues except as to the want of consideration for the £400 note.

Platt and *Butt* for the plaintiffs.

Erle and *Humfrey* for the defendants.

[Attornies—*Roy & Co.* and *J. Alexander.*]

BOSANQUET and Others *v.* CORSER.

Feb. 13*th.*

A customer of a branch belonging to the London and Westminster Bank, having overdrawn his account, previous to a quarterly inspection of the affairs of the branch, handed over to the clerk who superintended the business of the branch, and who was his friend, a cheqne for £500, which was entered to the credit of the customer; the clerk promising that it should not be presented, but should be returned after the inspection was over. This cheque the customer had obtained from an acquaintance, giving him his own cheque for the same amount in exchange. It was not returned by the clerk to the customer according to his promise, but was found by the directors of the bank among the papers of the branch in the clerk's portfolio, after he had been discharged from his situation:—*Held*, that the directors might recover the amount of the cheque from the defendant.

ASSUMPSIT upon a cheque for £500, by the plaintiffs as holders, against the defendant as maker.

Plea, that the cheque was an accommodation cheque,

given by the defendant to one Chipperfield, without consideration, and also that there was no consideration between Chipperfield and the plaintiffs to entitle him to sue upon the cheque.

The facts of the case were similar to those detailed in the preceding case of *Bosanquet* v. *Forster*, so far as relates to the mode by which the plaintiffs obtained possession of the cheque. It was dated in March, 1840, and it appeared from the evidence of Chipperfield and Rees, that at six different quarterly periods, when the inspectors of the bank were expected to come and examine the accounts, Chipperfield, whose account was greatly overdrawn, obtained from different persons, and handed over to Rees as the manager of the branch, various cheques which were entered to the credit of Chipperfield's account, Rees promising him that they should not be presented. The cheque in question was with other securities put by Rees into his portfolio, and was found there by the directors, when they discharged him from their employ in the month of June, 1840. It appeared, also, that Chipperfield gave his own cheque to the defendant for £500, at the time when the defendant gave his cheque to him.

Erle, for the defendant, argued, as in the other case, that Rees being the agent of the plaintiffs, they were bound by his agreement with Chipperfield, and could not, therefore, sue upon the note; and also, that, as between Chipperfield and the defendant, there was clearly no consideration whatever for the cheque.

Platt, for the plaintiffs, contended that Rees had authority from the directors to receive cheques from a customer of the bank, and enter them to the credit of his account, but he had not any authority from them to agree not to present such cheque for payment.

GURNEY, B., told the jury that, in his opinion, in point

who, if his opinion was wrong, might set it r

The jury immediately found a verdict for t

Platt and *Butt*, for the plaintiffs.

Erle and *Humfrey*, for the defendant.

[Attornies—*Roy & Co.* and *J. Alexander*

In the ensuing Easter Term, *Erle* moved t
suant to the leave given at the trial, but thei

Refu

1840.

CENTRAL CRIMINAL COURT.

NOVEMBER SESSION, 1840.

BEFORE MR. JUSTICE BOSANQUET.

REGINA *v.* A. L. PEARCE.

Nov. 25th.

A man was indicted for shooting at his wife with intent to murder her, &c. Previous to the commencement of his trial he applied to the Judge to know whether his wife was to be produced as a witness for the prosecution, stating that her presence was necessary for his interests: the counsel for the prosecution stated that he should not call her; and the Judge told the prisoner that, although she was a competent witness against him, yet her presence was not indispensable. The prisoner was defended by counsel, who set up for him the defence of insanity. The prisoner, however, objected to such a defence, asserting that he was not insane; and he was allowed by the Judge to suggest questions to be put by his Lordship to the witnesses for the prosecution to negative the supposition that he was insane; and his Lordship also, at the request of the prisoner, allowed additional witnesses to be called on his behalf for the same purpose. They, however, failed in shewing that the defence was an incorrect one, and on the contrary their evidence tended to establish it more clearly, and the prisoner was acquitted on the ground of insanity.

THE prisoner was indicted under the 3rd section of the stat. 7 Will. 4 & 1 Vict. c. 85. The 1st count of the indictment stated that he, on the 1st of October, at St. Mary Abbots, Kensington, in and upon Elizabeth Pearce, (his wife), in the peace &c., feloniously did make an assault; and that he with a certain loaded pistol then and there feloniously did shoot at the said Elizabeth Pearce, with intent in so doing, and by means thereof, feloniously and wilfully, &c. to kill and murder her. There were other counts charging an intent to maim and disable, and to do grievous bodily harm.

Clarkson and *C. C. Jones* appeared as counsel for the defence; but before the jury were charged the prisoner himself applied to the learned Judge, to know whether his wife was to be produced against him or not, as her presence he considered necessary for his interest. He stated that she had not been produced at either of the examinations before the magistrate, and he wished her to be examined on the trial.

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REGINA v. PEARCE.

Clarkson said that he, as counsel for the prisoner when before the magistrate, made a similar observation as to the absence of the wife; but that circumstances had since come to his knowledge which induced him to consider that her attendance was not of importance — circumstances which would render it, at least, very doubtful whether the unfortunate prisoner was in a state of mind to be answerable for the act which undoubtedly he committed.

C. Phillips, for the prosecution, said that he certainly should not produce the prisoner's wife as a witness.

BOSANQUET, J.—The charge is one of personal violence to the wife, she is, therefore, a competent witness. But it is not indispensable that she should be called.

The prisoner said, that he wished to put questions to her which were essential to his defence, and as she was quite well in health he thought that she ought to be called.

Clarkson said, that the solicitor who instructed him had not made in the brief any suggestions as to the examination of the prisoner's wife.

The prisoner then asked his lordship if he was to understand that his appeal was overruled?

BOSANQUET, J.—Yes. The case will proceed, and such witnesses as are here will be produced; and we shall see at the close of the case whether the evidence is or is not sufficient to prove the charge against you.

The case then proceeded, and *C. Phillips*, in his opening speech, expressed it as his opinion, that the pri-

soner must have been insane at the time when he committed the act.

The facts having been proved by the witnesses for the prosecution—

Clarkson addressed the jury for the defence, and relied on the prisoner's insanity as an answer to the charge.

At the conclusion of his address the prisoner stated, that he did not agree with the observations which Mr. Clarkson had made; that he (the prisoner) had never seen the brief, nor had been consulted on the subject of his defence; and he denied that he was at any time suffering under any aberration of mind.

Clarkson stated that he relied on the prisoner's denial of his insanity, under the circumstances which had been proved against him, as one proof of the fact of his being insane.

Several medical men and others were called as witnesses to prove the prisoner's insanity. One of them, Dr. Marshall Hall, on being put into the box, refused to take the oath, saying, that he was a simple christian, and did not think it right to swear. He was not examined.

The prisoner was allowed to put questions in cross-examination to the witnesses for the prosecution, and also additional questions to the witnesses called for the defence. All the questions were considered, in point of form, as put through the learned Judge, though, in point of fact, most of them were put to the witnesses by the prisoner himself (*a*).

(*a*) In the case of Earl Ferrers, who was tried for murder before the House of Lords, it appears from the address of the Lord High Steward that counsel were assigned to the prisoner, but they do not appear to have interfered at all during the trial; and although

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REGINA v. PEARCE.

After *Clarkson* had finished his case the prisoner said, that he wished some witnesses to be called for the purpose of proving that he was not insane.

BOSANQUET, J., said—If the prisoner wishes to have any witnesses called I will call them, and put such questions to them as the prisoner wishes, if they are proper questions. But this case cannot be conducted in two ways—first by the prisoner's counsel, and then by the prisoner himself. But at his suggestion I can call a witness, and examine him.

Several witnesses were then called, but so far from their testimony proving that the prisoner was not insane, it went directly to establish the contrary position.

Verdict—Not Guilty, on the ground of insanity.

C. Phillips and *Ballantine*, for the prosecution.

Clarkson and *C. C. Jones*, for the prisoner.

[Attornies—*Roy, Blunt, & Co.* and *W. C. Humphreys.*]

the defence set up was insanity, yet the earl himself cross-examined the witnesses for the prosecution minutely to the facts of the transaction, and addressed the Court; and afterwards called and examined all the witnesses for the defence. It is, however, to be observed, that the earl afterwards spoke of his defence as one which he set up rather at the desire of his relatives than from any wish of his own.

1840.

BEFORE MR. BARON PARKE AND MR. JUSTICE BOSANQUET.

REGINA *v.* LITTLETON.

Nov. 27th.

THE prisoner was indicted for the wilful murder of Mary Nicholls.

The learned Judges having ascertained that counsel had not been instructed on the part of the prosecution, directed that the depositions should be put into the hands of some gentleman at the bar, and postponed the trial for a short time, to enable him to read them.

The depositions were handed by the officer of the Court to Mr. *Adolphus*, the senior barrister.

Adolphus, in addressing the jury, observed, that, under the circumstances, he should consider himself only as acting in assistance of the Judge, and not as in the ordinary situation of counsel engaged to conduct the prosecution.

PARKE, B., said, that when the depositions were delivered to counsel by direction of the Court, he ought to consider himself as counsel for the Crown, and should act in all respects as if he had been instructed by the prosecutor instead of the Court.

Verdict—Guilty of Manslaughter. Sentence—transportation for life.

Adolphus, for the prosecution.

Montagu Chambers, for the prisoner.

Where no counsel is engaged for the prosecution, and the depositions are handed, by direction of the Court, to a gentleman at the bar, he should consider himself as counsel for the Crown, and act in all respects as he would if he had been instructed by the prosecutor; and should not consider himself merely as acting in assistance of the Judge, by examining the witnesses.

1840.

BEFORE MR. BARON PARKE.

REGINA *v.* TAYLOR and WEST.

Nov. 28th.

Those who navigate the river Thames improperly, either by too much speed or by negligent conduct, are as much liable, if death ensues, as those who cause it on a public highway on land, either by furious driving or by negligent conduct.

In a case of manslaughter, it is the duty of the coroner to bind over all those witnesses who prove any material fact against the party accused, and not those who are called for the purpose of exculpating him.

However, if the coroner bind over all the witnesses on both sides, no blame is imputable to the clerk of indictments if he require them all to be put on the back of the bill, and examined before the grand jury.

THE defendants were charged on the coroner's inquisition only (the grand jury having ignored the bill of indictment), for the manslaughter of Michael Shea. The inquisition stated, that the defendants, on the 6th of October, &c., with force and arms, at the parish of Woolwich, in the county of Kent, and within the jurisdiction of the Central Criminal Court, upon the river Thames there, in and upon the said Michael Shea, in the peace of God and of our said Lady the Queen, and in a certain small boat called a skiff upon the said river Thames then and there being, feloniously did make an assault; and that the said defendants, being in a certain large vessel called the London, upon the said river, did then and there feloniously propel and force the said large vessel called the London, unto and against the said boat called a skiff, wherein the said Michael Shea was as aforesaid; and did thereby then and there feloniously cast and force the said Michael Shea from and out of the said boat called a skiff, into the said river, by means of which said propelling and forcing the said vessel called the London unto and against the said boat called a skiff, and casting and forcing the said Michael Shea from and out of the said boat called a skiff into the said river, the said Michael Shea, in, by, and with the waters of the said river was then and there choked, suffocated and drowned, of which said choking, suffocating and drowning, the said Michael Shea did then and there die.

Clarkson, in stating the case on the part of the prosecution, said:—This prosecution is instituted by the Corpo-

1840.

REGINA v. TAYLOR.

ration of the Trinity House, and their object is only that justice should be brought home to the defendants, if they have committed any offence; but there is undoubtedly a feeling on the part of the corporation against the mode of navigating large steam vessels on the river Thames. With respect to the law on the subject, I apprehend that the rule as to the mode of traversing the river Thames is to be the same as that applicable to the mode of passing along any of the Queen's common highways. Therefore I submit, that if it shall turn out that the speed at which, or the manner in which, the defendants were navigating the vessel and were proceeding before they saw the skiff, was such as to prevent them, after they did see it, from stopping in time to prevent mischief to the person in it, they will be responsible for the offence of manslaughter if his death happened in consequence. Before the coroner, the witnesses called for the defence were bound over, as well as those called for the purpose of making out the charge of manslaughter. Now, though the Coroner's Court is an open Court, and he is bound to hear those who can give material information touching the death of a person, yet, where the verdict of the jury points to a particular party as to blame, it is not the proper course for the coroner to bind over the witnesses who were called to exonerate such party. The absurdity of such a course is manifest. The officer of the Court here required that all the witnesses bound over by the coroner should be examined before the grand jury; and that, in my opinion, accounts for their ignoring the bill. On the question of whether it was an accident, I contend that if, on a misty night, the defendants were proceeding at such a rate that they could not stop in time, their so proceeding was illegal; and, as death ensued, they are responsible. Before the coroner, the defendant West made a statement with reference to the other defendant, Taylor.

PARKE, B.—The statement of West will not be evi-

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REGINA v. TAYLOR.

dence against Taylor, under such circumstances. Wh one man says in the presence of another, is only eviden against that other, on the ground that, by his silence, acquiesces; but that comes to nothing in this case. T coroner cannot have his proceedings interrupted by o man contradicting what another says.

Clarkson was further observing on the responsibility the defendants, when

PARKE, B., said—The allegation in the inquisition that the defendants forced and propelled the steam ve against the skiff. Evidence against those who gave immediate orders will be necessary to sustain this al gation.

Clarkson made some observation on the course pursu before the grand jury on the examination of some of witnesses for the defence.

PARKE, B.—You must pursue the same course he You must call some of these witnesses who were examin before the grand jury, one or more of them; and, und such circumstances, do you think that you could succ in obtaining a verdict? You have stated the law m correctly. There is no doubt that those who navigate river Thames improperly, either by too much speed, or negligent conduct, are as much liable, if death ensues, those who cause it on the public highway, either by furi driving or by negligent conduct. With respect to binding over of the witnesses, I apprehend it is the roner's duty to bind over those witnesses only who m out the case against the party charged, and not those w are called to rebut it.

Clarkson said, that, after such an intimation from Lordship of his opinion, under the circumstances,

considering the difficulties which beset the case, he should take upon himself to withdraw from the prosecution.

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REGINA v. TAYLOR.

PARKE, B., to the jury.—I believe the case would, at the end, be one of considerable doubt; and I think the learned counsel has incurred no blame in not offering any evidence against the defendants.

Verdict—Not Guilty.

AFTER the verdict had been given, *Clarkson* informed his Lordship that Mr. Roper, the clerk of the indictments, was apprehensive that some of his observations might be considered as referring to him.

PARKE, B.—No, not at all: he was not in fault. He only acted according to the usual practice.

The coroner, being present, then addressed the Judge, and said, that, in his opinion, without the testimony of the witnesses called from the steam vessel, and whom the counsel for the prosecution styled witnesses for the defence, no verdict of manslaughter could have been returned at all.

Clarkson observed, that he was sure the coroner did not mean to represent, that all the witnesses examined before him were material witnesses on the part of the prosecution.

The coroner replied, that, in his judgment, those witnesses were material witnesses to be bound over.

PARKE, B.—All that I need say, is this: it is the duty of the coroner to bind over all those witnesses who prove

[Attornies—*Teesdale & Co.*, and *Jacobs*.

DECEMBER SESSION, 1840

BEFORE MR. JUSTICE PATTESON.

Regina *v.* Mazeau, Ramuz and Ra

Dec. 17*th*. Three prisoners (foreigners) were indicted for feloniously engraving and making two parts of a promissory note of the Emperor of Russia. The indictment was framed upon the stat. 11 Geo. 4. & 1 W. 4, c. 66, s. 19.

THE prisoners were indicted for felonious and making upon two plates, two parts of note for 25 rubles, of Nicholas, Emperor of charge was stated in various ways in different indictment.

From the evidence for the prosecution it a the prisoners Ramuz and Mazeau had been f

The plates were engraved by an Englishman, who agent in the transaction. It appeared that two of the prisoners only were pr when the order was given for the engraving of the plates, but they said they get it done by a third person, and there was some evidence to connect the third other two in subsequent parts of the transaction. The questions left to the jur ther the two who gave the order for the engraving knew the nature of the 2ndly, whether all three concurred in the order given. The Judge told the jur find all three guilty, they must be satisfied that they jointly employed the engrav not necessary that they should all be present when the order was given, as it w

1840.

REGINA v. MAZEAU.

acquainted with an engraver named Salt, and that on the 9th of August Mazeau went to Salt and shewed him two Russian notes, and had some conversation with him about engraving some plates, and some days after Mazeau came again accompanied by Ramuz, and both told Salt that he was to go on with the engraving, and both gave him some money, and it was proved that they both came together to him frequently during the progress of the work. The evidence against the third prisoner was as follows: Mr. Salt said, "When I took the print Mazeau told me the man they were executing the order for was present in their house, in their parlour; in consequence of what he said, I watched outside the door after I left, and saw the prisoner Rault come out of the house." Being asked whether he had ever seen Rault at any other time than that, he said "I have seen him several times during the progress of the engraving; I have seen him in conversation with Mazeau and Ramuz." Mr. Salt's wife said, "I know the three prisoners. I have seen two of them a great many times; but one not so often as the other two; I only saw the three prisoners together once, that was on the Thursday that they were taken into custody; I saw them at the corner of Princes-street and King-street, about two o'clock, I think. I think they were all three together; they were standing together for a short time, and then they dispersed; Rault went one way, and Ramuz and Mazeau went together another way. I did not notice what they were doing when they stood together, no more than they were talking together; they were close to our window; I was in the shop at the time. I had no reason for watching them. I did not look at them with any particularity; I merely said to Mr. Salt that they were standing there three together; I had seen Mazeau and Ramuz a great many times coming to our house on business; I had seen Rault once before, alone, at the door in King-street." On his apprehension, some proofs from the plates and a Russian passport were found upon Rault.

soners; and that in order to make out such j
ment, it was necessary to shew that all three
at the time the order was given.

Patteson, J.—I quite agree that there mu
employment, and that all these three person
convicted on this indictment unless the jur
they jointly employed Mr. Salt. But I do
with Mr. Chambers in saying that they must
present at the time when the order was given
I am of opinion that if it be shewn that two
the order on behalf of themselves and ano
that other person being the other prisoner, he
nected by some evidence with the employment
there is such evidence in the case is a ques
jury; I cannot withdraw the case from their c

C. Phillips then addressed the jury for
Mazeau, and *Montagu Chambers* for the prison
The prisoner Ramuz defended himself.

Patteson, J., in summing up said, the wor
of Parliament (*a*) bearing upon this case are,
son shall engrave or in anywise make upo
whatever, or upon any wood, stone, or other
bill of exchange, promissory note, undertaki
for payment of money, in whatever language
the same may be expressed, and whether

note, undertaking or order of any foreign prince or state, or of any minister or officer in the service of any foreign prince or state, or of any body corporate, or body of the like nature constituted or recognized by any foreign prince or state, or of any person or company of persons resident in any country not under the dominion of his Majesty, without the authority of such foreign prince or state, minister or officer, body corporate or body of the like nature, person, or company of persons, the proof of which authority shall be on the party accused, every such offender shall be guilty of felony." Now I take it in the first place to be clear, that whatever was done by the parties here charged, was done without the authority of the Emperor of Russia; but these parties do not, upon the evidence adduced, all stand in the same position. You cannot find all guilty unless you are of opinion that they jointly employed Salt to make the engraving. If you are satisfied that Rault first communicated with the other two, and then that they all concurred in employing Salt, the three prisoners may be found guilty; but you cannot find Rault guilty if you think he employed the other two to get the plate engraved by any person, and they afterwards, of their own accord, employed Salt. You may acquit all or any one of the prisoners, if you are satisfied that they did not employ Salt. It is clear, under the words of the act of Parliament, and taking the evidence to be true, if Ramuz and Mazeau knew the nature of the instrument that the case is brought home to them; and I am inclined to think, that if by Salt they engraved the plate, although they did not know the nature of the instrument, they are within the act; but I am not confident of that, and shall ask you to say, whether you think they knew the nature of the instrument which they employed Salt to engrave. With respect to the guilt of Rault upon this indictment, the evidence is certainly not so cogent. He is not brought forward until a very late period, long after the order had been given by the other two prisoners, when he is seen

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REGINA v. MAZEAU.

coming out of their house, and he is subsequently seen in their company. When he is apprehended, he gives his address in Portland Street, and at that address, in the room he occupied, the first proof of the plate is found, and other proofs are also found upon him. These circumstances, however, do not clearly lead to the inference that you must arrive at, before you can pronounce him guilty on this indictment; for, to make him answerable for the offence now charged, you must be satisfied that he was a party concerned in giving the order originally to Salt. For that purpose, it seems to me, the evidence is but slight; but should you think that he did originally instruct the other prisoners, and that by his authority they went and employed Salt, they may all be convicted. If you do not think that, Rault must be acquitted. You will, therefore, say, whether Ramuz and Mazeau knew what the contents of the plate were, and what the nature of the instrument was; and you will also say, whether Rault was a party concerned in giving the original instructions to Salt.

The Jury found Ramuz and Mazeau Guilty, stating, that they believed they did know the nature of the instrument; and they found Rault Not Guilty, stating, that, as against him, the evidence was not conclusive.

Platt, *Bodkin*, and *Doane*, for the prosecution.

C. Phillips and *Clarkson*, for the prisoner Mazeau.

Montagu Chambers for the prisoner Rault (*a*).

[Attornies—*Bush & Masters*, and *Roberts*.]

(*a*) The prisoner afterwards pleaded guilty to an indictment, which charged him with having in his possession, without lawful license, a piece of paper, on which was printed part of a promissory note of the Emperor of Russia.

See the cases of *Rex* v. *Harris and Others*, ante, Vol. 7. p. 416 et seq.

1840.

REGINA *v.* CULLEN.

Dec. 17*th.*

Semble, that the true construction of the 22nd section of the 9 Geo. 4, c. 31, in relation to the offence of bigamy, is this: not that the party, charged to be deprived of the benefit of its provision as a defence, must have known at the time when he contracted the second marriage, that the first wife had been alive during the seven years preceding, but that to bring him within that provision, he must have been ignorant during the whole of those seven years that she was alive.

THE prisoner was indicted for bigamy.

From the evidence on the part of the prosecution, it appeared that the prisoner was married to his first wife, Mary Ann Mitchell, on the 23rd of February, 1824, and that after their marriage they lived together till the month of September, 1825.—The witness who proved these facts was named Mary Bridge, and she said in addition—"I saw Mary Ann Mitchell here to-day, she is the same person to whom the prisoner was married in 1824. I do not know where she has been living within the last six years, or nearly six years. *I saw her in* 1834. I am not sure whether it was the latter end of July, or the beginning of August, but I am sure it was in 1834. She then lived at the corner of Cannon-Place.—I saw her in Whitechapel—*the prisoner was with her—he went to her there; I saw them walking together.*"—This witness admitted that they separated in 1827, or the beginning of 1828, and that she did not see the wife again till the time she had mentioned in 1834.

The second marriage was proved to have taken place on the 16th of November, 1840.

The second wife was examined as a witness for the prosecution, and said that the prisoner occupied lodgings in her house, which he took on the 15th of June, 1840: that on the 2nd of August he met with a violent accident, and kept his bed about three weeks, after which he paid his addresses to her, and proposed to marry her.—She added, "I ascertained a little, and I told him, I did hear, he certainly had been a married man: he said he had, but it was about seventeen years ago: that he had not seen his wife for nearly eight years, and he believed she was dead, as he had not seen her. I believed so too, as he had not seen

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REGINA v. CULLEN.

her. I believed what he told me, and married him." The witness was cross-examined, with a view to shew that, after the accident, the prisoner was not in his right senses; but she said that he was very bad from his head for some time after, but always spoke very rationally to her, and did not seem to her to have anything the matter with him, except that he was rather outrageous at times in his temper.

Montagu Chambers, for the prisoner, in addressing the jury stated, that he should be able to bring the prisoner within the proviso of sect. 22 of 9 Geo. 4, c. 31 (*a*), by shewing in addition to the fact of the separation in 1827, proved on the part of the prosecution, that the prisoner had been continually absent from his wife for more than seven years previous to the second marriage. He denied that the testimony of Mrs. Bridge, as to the meeting in 1834, could be depended upon; but he also said that conceding that it was correct, he should prove that the prisoner, shortly before his second marriage, received a serious injury from a blow on the head, which for some time rendered him insensible and delirious, and had impaired his memory; and he submitted that if at the time of the second marriage the jury from this circumstance could infer that he did not know that his first wife had been alive during the seven years he would be within the protection of the proviso.

Witnesses were accordingly called, two of whom were actors at the Surrey Theatre, at which place the prisoner also was engaged as an actor. One of them said—"I knew him before the attack which was made upon him, when he

(*a*) That proviso, so far as relates to this question, is as follows—"Provided always, that nothing herein contained shall extend to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time."

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was struck on the head: before that time he was a very excellent, dependable, good actor: you might always rely upon him with safety for memory and regularity: since that I have observed a very visible alteration; his memory has been very indifferent, and he has been flighty, and it has been remarked by us that there has been a great alteration in him since that." The other said—"I have frequently observed an alteration in him since he received the injury in his head." Several witnesses were also called, the substance of whose testimony was, that they had known the prisoner since the year 1833, and never saw any female with him who passed as or appeared to be his wife.

PATTESON, J., (in summing up), said—The case is proved to this extent, that Cullen the prisoner was married in the year 1824 to M. A. Mitchell, who is now alive, and to Jane Bristow in the month of November of the present year. But the prisoner seeks to bring himself within the proviso of the act of Parliament, and the point turns upon the construction of that proviso. It appears that the prisoner and his first wife were separated in the year 1827, and I think it must now be taken that they have not lived together since. If the case had so rested, the question would have arisen whether a party who having been so separated or so continually absent from his wife for the space of seven years, is bound, upon an indictment for bigamy, to prove that he used due diligence to ascertain whether his wife was living before he contracted a second marriage; but should you believe the evidence of Mrs. Bridge, and that she is accurate as to the time when she states she saw the prisoner and his first wife in company together, that question is not raised. If she is accurate, he was aware in 1834 that his first wife was living, and it seems to me that the true construction of the proviso is, not that the party must know at the time when he contracts a second marriage, that the first wife has been alive

words that are employed. If also the quest
proviso had been as to the prisoner's knov
time when he contracted the second marriag
stance of the accident he met with and the
duced might have been considered, but it
have any effect. If, then, you think Mrs. B
rate in her statements as to time, the prisone
the proviso; but if you think she is not accu
question will arise, whether, in point of law,
to make inquiries as to the fact of his first w
at the time when he was married a secon
will therefore give me your opinion whethe
Mrs. Bridge's account to be accurate, and, if
fied that it is, will pronounce the prisoner
you think it is not, then I shall feel bound
further upon the point of law I have mentio

The jury, after consulting together for so
that they thought the evidence of Mrs. Bridg
and accordingly pronounced a

Verdict of Guilty.—The prison
tenced to six months' imprison
out hard labour.

Clarkson, for the prosecution.

COURT OF COMMON PLEAS.

1839.

Adjourned Sittings in London after Michaelmas Term, 1839.

BEFORE MR. JUSTICE COLTMAN,
Who sat for the Lord Chief Justice.

DEACON & Others, Executors, &c. of Deacon, deceased, *v.* STODHART & Others.

Dec. 11*th.*

To assumpsit on a bill of exchange for £150 by the executors of

ASSUMPSIT on a bill of exchange, dated the 30th of November, 1836, for £150, at three months from the date, the indorsee against the acceptors, the defendants pleaded, that, on the day when the bill became due, they duly paid and honoured it when presented, according to the tenor and effect of it and of their promise, and then paid the said sum, to wit, £150, the amount made payable by the said bill. It appeared, that, before the bill became due, the indorsee, not having any banker of his own, handed the bill to a friend, in order that he might present it at the bank of Messrs. W. & Co., where it was made payable. This friend indorsed the bill, and got it discounted at the Bank of England; but afterwards receiving an intimation from the party from whom he received it, that it was not to be noted, sent the amount of the bill to the banking-house at which it was payable, on the understanding that he was to have the bill delivered up to him. The acceptors kept cash at that banking-house, and when the bill had been paid, the transaction was entered in their account as if the money to meet the bill had been paid by them; but the bill was delivered up to the party who, in fact, paid in that money. The jury having on this issue found a verdict for the defendants, the Court of Common Pleas set it aside, on the ground that this payment could not, under the circumstances, be considered as a payment by or on the behalf of the acceptors, but must be taken to have been a payment for the honour of the indorser.

The defendants also pleaded that the acceptance was an accommodation acceptance for the drawer, with the knowledge of the indorsee; and that the drawer became insolvent, and the indorsee, the defendants, and two other creditors, agreed among themselves, as his friends, to release their several back debts and liabilities. The plea averred that the defendants and the two other creditors *did discharge and release their several debts, &c.;* and then went on to state that the indorsee, in consideration of the premises, and that certain other creditors would release, abandon, and never enforce payment of their debts, agreed with the defendants that he would never ask for, sue for, demand, or enforce payment of the said bill of exchange. There was then an averment that the other creditors had released their debts. The replication to this plea stated that the indorsee did not agree in manner and form as in the plea mentioned. The evidence was, that the indorsee at first promised to sign the account, if some more signatures were obtained to it; but, after they were obtained, he refused to sign it, but said, on one occasion, that he knew the bill was an accommodation bill, and he should not call on the defendants to pay it; and on another, that the bill should not come against any of the parties, but that he himself would come in as the rest of the creditors. The agreement, signed by the creditors, contained these words: "We, the undersigned, do hereby agree to accept of a release from the said E. A. [the drawer] of the equity of redemption, &c.; and *we agree, upon the execution of such deed, to execute releases,*" &c. The indorsee died, and the action on the bill was brought by his executors:—*Held*, that the allegations in the plea were not sustained by the evidence.

they did not promise in manner and form, [illegible]

To the count upon the bill of exchange, t
pleaded—1st, that they, before the commen
suit, to wit, on the 3rd day of March, 1837,
bill became and was due and payable acc
tenor and effect thereof, duly paid and hono
when presented for payment, to wit, on the
year aforesaid, according to the tenor and
and their said promise, and then paid the sai
£150, the amount made payable by the said

The defendants pleaded also to the count
that they accepted the said bill of exchange f
modation of the drawer thereof, the said E
knowledge and privity of the said Francis
deceased), and that "afterwards the said E.
solvent, and was indebted to divers persons
of money, and thereupon afterwards, to wit, c
of February, 1837, the said Francis Deacon
Wilson, one Thomas Alder, and the defend
being creditors of the said Edward Andrew
the said E. A. was then under pecuniary liab
amongst themselves, as the mutual friend
E. A., and for his relief and ease and bene
their several debts and liabilities to the sa
never afterwards to enforce payment thereof;
defendants and the said S. W. and T. A. th
and released to the said E. A. their several de

demand, ask, or sue for payment of their respective debts or liabilities. And the said F. D. then, *in consideration of the premises*, and that certain other creditors of the said E. A. would release, abandon, and never enforce payment of their debts against the said E. A., agreed to and with the said defendants, and then faithfully promised them, the defendants, that he, the said F. D., would never ask, sue for, demand, or enforce payment of the said bill of exchange, in the said first count mentioned; and the defendants say, that, by reason and in consideration of the said promise by the said F. D., and of the said defendants and the said S. W. and T. A., never to enforce payment or ask, sue for, or demand payment of their respective debts or liabilities as aforesaid, the said other creditors of the said E. A., to wit, one Mr. P., one Mr. F., and one Mr. V., agreed with and promised the said E. A. to release their several debts and liabilities, and never to enforce, ask for, sue for, or demand payment of their debts and liabilities respectively, amounting together to a large sum, to wit, the sum of £1000; and the defendants say, that they, the defendants, and the said S. W., T. A., Mr. T., Mrs. F., and Mr. V., creditors of the said E. A. as aforesaid, in consideration of the premises and the said promises by the said F. D., never have enforced, sued for, asked, or demanded payment of their debts respectively, or any part thereof, and *have released the same* to the said E. A., for and upon the considerations aforesaid.

The plaintiffs, in their replication, joined issue upon the pleas of the general issue and payment; and to the other plea, replied that Deacon did not agree in manner and form as in that plea alleged.

Atcherley, Serjeant, for the plaintiffs, stated that the only question in the cause was as to the bill of exchange, and therefore

Thesiger, for the defendants, began by stating their case, the affirmative of the issues as to the bill being

the Doctor's congregation, agreed to join
and one was accordingly drawn by Deacon,
by Dr. Andrews, and the names of the de
put upon the bill as security. Arrangeme
wards made to let Dr. A. have £12,000
which was freehold, &c. &c.; and another
Dr. A. and accepted by the defendants, w
for the former. Shortly before this latter bi
it was found impossible to settle Dr. A.'s
some arrangement among the creditors to
20s. in the pound. A mortgage, to take e
other mortgages, was accordingly prepared
was requested to consent to the arrangemen
agreement which had been prepared. He at
and sent for pen and ink to sign, but after
should like to see a few other signatures bef
The agreement was therefore taken to other
signed it on the faith of the understandin
would sign afterwards. Deacon, however,
said he should not expect any dividend, a
care that Messrs. Stodhart, the defendants,
called upon to pay the bill. On this state
tend that it will be a fraud if the 4th plea
vail. The bill became due on the 3rd of M
came to the banking-house of Weston & Co.
and the account of the defendants there wa
it. How, then, can the executors of Dea

as a witness for the defendants, and said, "I called on Mr. Deacon on the 17th of February, 1837; I was then a creditor of Dr. A.'s for 73*l.* 10*s.* I went with Mr. Stodhart junior, and Mr. Alder; we talked with Mr. Deacon about a bill of exchange for £150. Mr. Deacon acknowledged that the bill accepted by Messrs. Stodhart was an accommodation bill, and said he should not call upon them to pay it: we asked him to sign the agreement; he read it to himself; he consented to sign it, and got up for a pen and ink for the purpose, but after a little consideration, he said, 'I should like to see a few more signatures,' and we were to call again when we had obtained them, and he said he would then sign it; there were the three signatures of Stodhart, Alder, and myself. I in consequence assisted in getting other signatures, and procured Mr. Turner's and Mr. Valentine's: in a few days I and Stodhart went to Deacon again, and he declined to sign the agreement, but gave us his word that the bill should not come against any of the parties, but he himself would come in as the rest of the creditors, and take what there was, and return the same to Dr. A.; he was a friend of Dr. A.'s, and so we were all: he saw on the second interview three additional signatures; he did not assign any reason why he would not sign; it was a third mortgage on the chapel which belongs to Dr. A." On his cross-examination, the witness said, "Dr. A. now keeps on the chapel; Stodhart collected the pew-rents, which constitute the funds of the chapel; Alder was only a member of the congregation, not a deacon; I believe the property was always considered valuable." On his re-examination, he said, "I have not been paid any portion of my debt."

Mr. Alder confirmed Mr. Wilson's account, and said in addition, on cross-examination, "I claim to be a creditor now for £200 as before." On re-examination he said, "The £200 is against my name in the instrument I signed."

The instrument was then read. The material part was

for £250; I remember some gentlemen
and requesting me to sign this paper, whi
not willing to do, and they said my signin
the arrangement with other parties. I
Mr. Deacon's name being mentioned: it
1837; to the best of my belief no name w

Mr. Valentine, another creditor, said, "
sequence of a meeting at the office of Mr.
where several other creditors were prese
lieve Dr. A. from his unpleasant state of
son, with Mr. Stodhart and Mr. Alder, br
to my office to sign; this was after the me

It was also proved that a Mrs. Fenner,
amount of £495, had signed the agreemen

To make out the plea of payment, a
Weston & Co., bankers, in Southwark,
said, "Messrs. Stodhart, in 1837, kept an
house, and do still. This bill, which bec
3rd of March, was paid at our banking-ho
and cancelled in the usual way on the
cross-examination he said, "I paid the bil
The money was paid in for the bill by an
the express purpose of meeting this bill;
by whom. The money was not paid in by
ple; there is the indorsement of Messrs. J
cannot say who called, but I took the m

I cannot swear that the gentleman who paid in the money did not say it was taken up for the honour of the indorsers; we gave Stodhart's account credit for the money paid in to meet the bill; we entered the receipt and payment in Stodhart's account as the most correct mode of preserving a record of the transaction."

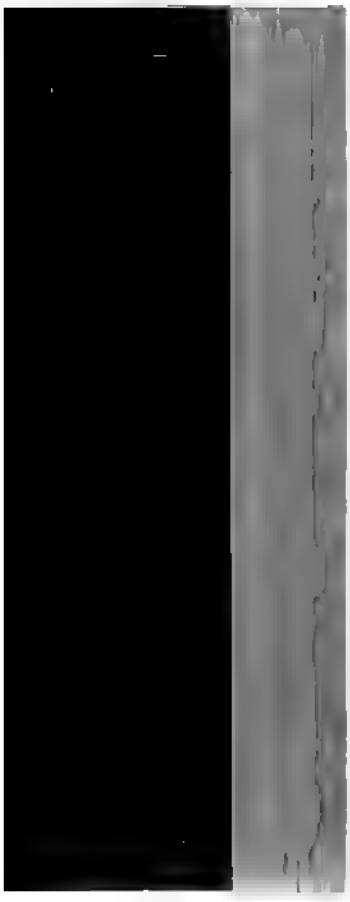
Atcherley, Serjt., for the plaintiffs.—I submit that the evidence which has been given is no answer to the action. First, as to the plea of payment, it says, that the defendants duly paid the bill, which I apprehend is clearly negatived. This has been decided on the argument on the demurrer to the 3rd plea. [*Petersdorff*, s.—That plea was held bad, because it did not state that the defendants themselves paid the bill.] The plea means you have improperly called on me; because I, the acceptor, have paid. If the endorser had paid, the acceptor would be still liable to him. The evidence is, that the bill was not paid by the acceptor.

COLTMAN, J.—We must take the opinion of the jury as to the matter of fact, whether this bill was paid by the acceptor or some other person, and whether that will be an answer to the action or not may be seen by and by. I am inclined to think that it may.

Atcherley, Serjt.—Then, as to the other special plea, every important allegation in it is negatived. The words are that it was an accommodation bill, with the knowledge and privity of the said Francis Deacon. Now it was a substitute for another bill in which the parties were reversed.

COLTMAN, J.—Still he was not the party bound to pay, being the drawer.

Atcherley, Serjt.—The second point is, that the Stodharts received the pew rents for the doctor. These two



themselves creditors of Dr. A

COLTMAN, J.—The questio
der the agreement. There
other. The words are "do
release from the said Edwa
redemption, &c., and we agre
deed to execute releases," &c

Atcherley, Serjt.—The pl
ment, and the instrument its
ment. There is a third alleg
did actually release and di
Andrews.

COLTMAN, J.—That is not

Thesiger.—We must loo
only denies Deacon's releasin
did.

Atcherley, Serjt.—Then,
lect Mr. Deacon's name bein
or Valentine shewn to have
as to Deacon, and this dispro

Atcherley, Serjt.—I submit that the words "by reason whereof" form a substantial part of the plea, and this is disproved; but if it is not so, yet there was no agreement by Wilson, Alder, and Deacon, to release Andrews—no absolute agreement.

Petersdorff, on the same side.—Let us look at it as if a creditor had brought an action against Dr. Andrews, and, if so, Dr. Andrews must have shewn that he had done what he had agreed to do, viz. assigned the equity of redemption: and this is not done here; and there is no absolute release, but only one conditional on the assignment, which has not been made.

Thesiger.—The only point raised by the replication is, whether Francis Deacon did agree in manner and form as in the plea alleged. The agreement stated in the plea as to him is, that he agreed that he would not ask for, sue for, demand or enforce payment of the said bill of exchange.

COLTMAN, J.—That is the point—how much is denied? The question is, and it is one of some nicety, whether by putting in issue the agreement, you put in issue the consideration also.

Thesiger.—Your Lordship can give leave to amend under the 3 & 4 Will. 4, c. 42, s. 23, but we need not do it now.

Atcherley, Serjt.—The power of amendment cannot be reserved.

Hoggins.—In *Story* v. *Richardson*, TINDAL, C. J., said, that the Court above might amend if necessary.

COLTMAN, J.—That is under the twenty-fourth section of the statute.

Atcherley, Serjt.—This is substance, variance, and it is not amendable under t

COLTMAN, J.—What I must do is, I m nion of the jury whether the agreement as specified here, and the rest will be a Court above. I think, and I shall tell t the consideration is admitted, and the pro issue by the replication. This is in acc decision of the Court of Common Pleas la will also be the question for the jury as to payment of the bill by the defendants. I on the day, I shall be inclined to think, law it was a payment by the defendants, a is made out.

After some further discussion COLTMA there were difficulties in the way of reservi amend, and he therefore could not do it.

Atcherley, Serjt., then addressed the ju tiffs, and called witnesses, whose evidence w that, some time before this bill became du had no banker, left the bill with a Mr. merchant, in Gracechurch-street, that he n sented when it became due. Jones endors got it discounted at the Bank of Englan

his endorsement it would be given up to him, and he was answered in the affirmative. Accordingly, on the morning of the day when it became due he paid in the money to meet it, and afterwards, though not without some delay and difficulty, got possession of the bill.

COLTMAN, J., in summing up, said, that if the bill was paid either by the defendants themselves or by some other person for them, in consequence of some supposed arrangement by which they were to be protected from the payment, it would be, in point of law, a payment for them—generally speaking (said his Lordship) a payment for honour is not made till after default by the acceptor. It is a singular circumstance that, in the present case, the bill should have been paid for the honour of the endorser before payment had been refused by the acceptor. It will be for you to say, whether the allegation is made out, that the bill was paid by the defendants when it became due, according to the custom of merchants; and it will be so paid if it be paid either by the defendants themselves or by any other person on their behalf. With respect to the other plea, what the defendants undertake to prove is, that Valentine, Fenner, and Turner agreed not to enforce their demand, in consideration that Deacon agreed not to enforce his claim. The words of the agreement are—"We, the undersigned creditors of Edward Andrews, do hereby agree to accept of a release from the said Edward Andrews of the equity of redemption, &c., and we agree upon the execution of such deed to execute releases," &c. It seems to me, that the creditors named have not agreed absolutely to release, but only conditionally, and on this ground I am of opinion that the issue on this plea must be found for the plaintiffs.

Verdict for the plaintiffs on the issue as to the agreement, and for the defendants on the issue as to payment. The jury said "We

In the ensuing Term, *Atcherley*, Serjt.
nisi for entering a verdict for the plaintiff
the plea of payment, on the ground that th
jury on that issue was against the evidence

This rule came on to be argued in the c
Term, 1841, when the Court being clearly
according to the evidence the bill had no
the defendants, the acceptors, but by J
improperly parted with it, in order to get it

R

Adjourned Sittings at Westminster after Trin

BEFORE MR. JUSTICE MAULE,

(Who sat for the Lord Chief Justi

1840.
June 26th.
In assumpsit for goods sold and delivered, where the price is above £10, and nothing

SMITH and Others *v.* ROLT.

ASSUMPSIT.—The 1st count was for 57*l.*
sold and delivered; the 2nd count, for work
rials found; and the 3rd count, for 57*l.* 12*s.*
stated. The defendant pleaded first that

was in respect of an entire contract for the sale of goods for a price exceeding £10, and that the defendant did not accept or receive the goods or any part of them, or pay any thing as earnest, to bind the bargain, nor was there any note or memorandum in writing of the bargain signed by the defendant or his agent lawfully authorized. The plea to the 2nd count commenced by stating, that the work and materials mentioned in it were for preparing certain goods above the price of £10, and not actually made at the time of the contract, and then proceeded in a similar form to the plea to the 1st count. The plaintiffs joined issue on the 1st plea, and to the 2nd and 3rd replied that the defendant actually accepted the goods.

It appeared that the defendant, being about to paper his house, called at the plaintiffs' premises, and was shewn some paper, and the party who shewed it him, wrote on the back of the pattern piece the following words as a memorandum of the terms agreed upon :—"The paper 2*s*. 8*d*., at 1*s*. 4*d*. per piece to put up." The plaintiffs only claimed the 2*s*. 8*d*. for the paper itself, which had been delivered at the defendant's premises, but not put up.

Talfourd, Serjt. for the defendant, submitted that the plaintiffs must be nonsuited, as according to the writing the whole was one entire contract.

Platt & Hoggins for the plaintiffs, contended that the charge of 1*s*. 4*d*. a piece was only to be made if the defendant should eventually require the plaintiffs to put up the paper, and was a separate matter from the charge of 2*s*. 8*d*. for the paper itself.

MAULE, J., was of opinion that it was a proper case to go to the jury upon the evidence.

Talfourd, Serjt., to the jury.—There is no acceptance

1840.

SMITH v. ROLT.

to satisfy the statute. In the case of *Phillips* v. *Bistolli* (*a*), it is said by the Court, "In order to satisfy the statute there must be a delivery of the goods by the vendor with an intention of vesting the right of possession in the vendee; and there must be an actual acceptance by the latter with an intention of taking to the possession as owner."

On the part of the defendant it was proved that the paper was brought to his house at a time when it was in the care of a charwoman, and that upon its coming to the defendant's knowledge, he wrote to the plaintiffs desiring them to fetch it away.

Platt, in reply.—The order was clearly given, and as the charwoman had a general authority to receive goods at the house, her receipt of the paper is an acceptance which will bind the defendant.

MAULE, J. told the jury that there were two questions for their consideration:—first, was there in fact an order given by the defendant for the goods in question? Secondly, if such order was given, then was there an acceptance by him of the goods with an intent to take to them as owner?

Verdict for the defendant.

Platt and *Hoggins* for the plaintiffs.

Talfourd, Serjt., and *Wightman*, for the defendant.

[Attornies—*Martindale* and *Parnther & F.*]

(*a*) 2 B. & C. 513.

1840.

BEFORE MR. JUSTICE ERSKINE.

(Who sat for the Lord Chief Justice.)

WACKERBATH and Others *v.* RICH.

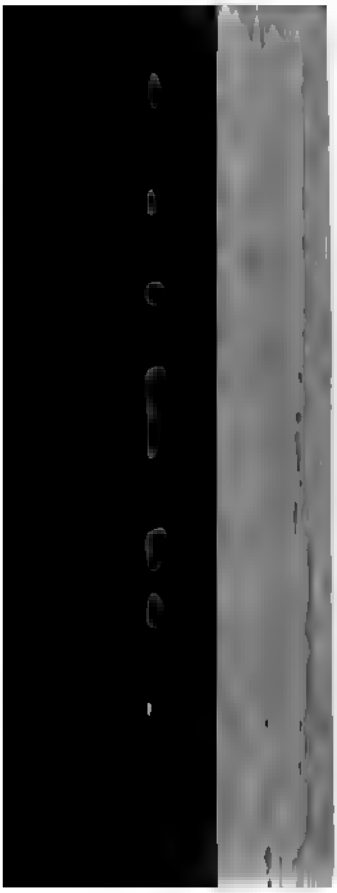
June 27th.

THE declaration stated that the defendant on the 4th of October, 1838, seized, took, and carried away certain goods to wit, 250 cwt. of sugar of the plaintiffs, of the value of £1000, and kept and detained the said goods for a long space of time, &c. There were similar complaints of seizures on the 6th, 8th, and 10th days of October, and the declaration then stated that by reason of the said several seizures and detentions of their said goods by the defendant, the plaintiffs had lost and been deprived of the use and benefit of the said goods during the respective times aforesaid, and had necessarily become liable to pay divers large sums of money for the warehousing of the goods, and were prevented from selling or disposing of them or delivering them to the purchasers, and became and were liable to pay £100 to one John Chapman, who had purchased a large quantity because it was not delivered within a reasonable time.—Plea, not guilty (*a*).

The object of the legislature in passing the stat. 3 & 4 Will. 4, c. 58, was to insure that double-refined sugar should be *pure sugar:* and, though it says that the single-refined sugar from which it is made must be of a uniform whiteness throughout, that must be taken to mean of a uniform whiteness according to the subject-matter; and does not mean that every loaf or lump must be free from all discoloration.

By that statute standard samples must be provided for the purpose of comparing double-refined sugar with them; and these standard samples must be made from single-refined sugar of a uniform whiteness throughout, and double-refined sugar entered for the bounty if it be not of a quality equal to the standard sample may be seized:—But there is not, in point of law, any right to seize such sugar on account of a discoloration which prevents it from being of a uniform whiteness if it be in fact equal in quality to the standard sample, and the discoloration does not arise from impurities.

(*a*) This plea was not marked in the margin by statute, as required by the rule of 1 Vict. Trinity Term, which is as follows:—"It is further ordered, that in every case in which a defendant shall plead the general issue, intending to give the special matter in evidence by virtue of an act of Parliament, he shall insert in the margin of the plea the words 'by statute,' otherwise such plea shall be taken not to have been pleaded by virtue of any act of Parliament, and such memorandum shall be inserted in the margin of the issue and of the Nisi Prius Record." Under these circumstances it seems that the plea



in the stove, and being *of a un*
or such sugar pounded, crushed,
exported in a British ship, fo
—exported in a ship not British
Double-refined sugar, and sugar
refined sugar, additional bounty
By section 7 it is enacted, that
and at the expense of the Co
London, as many loaves of dou
in manner thereinafter directe
Customs shall think necessary
proved of by the Commissioners,
to be *standard samples*, &c., fo
therewith double-refined sugar,
to double-refined sugar entere
bounty—"Provided always th
deemed to be a proper sample
as aforesaid, if it be of greater
less it be a loaf complete and w
shall have been made by a dis
finement from a quantity of
part of which had first been p
refined, and had been made i
were of *a uniform whiteness*
thoroughly dried in the stove."
"That in case any sugar which

to obtain the bounty on double-refined sugar, or sugar equal in quality to double-refined sugar, shall on examination by the proper officer, be found to be of *a quality not equal to such standard sample,* all sugar so entered shall be forfeited and may be seized." In September, 1838, the plaintiffs, who are Sugar Refiners, contracted to supply a Mr. Chapman with a certain quantity of sugar equal to double-refined sugar. It was submitted, among other persons, to the defendant, who held the situation of searcher under the Commissioners of Customs. The defendant, under the pretence that the sugar in question was not of the quality entitling the plaintiff to the bounty, seized and detained it. He thought that as it was not of a uniform whiteness throughout, he was entitled to seize it, and did so; but the act of Parliament only required that it should be equal in quality to the standard sample, and it was not necessary that it should be of a uniform whiteness throughout. Two courses are open to a party under such circumstances,—he may commence a suit in the Exchequer, and he may apply to the Lords of the Treasury, who may allow the sugar to be exported with the bounty. On the report of Dr. Ure and Professor Dadd, the Treasury ordered the sugars to be restored, and they were ultimately exported and the bounty was paid. I am surprized that a public board should support their officer under such circumstances. By the 2nd section of the statute, bounties are to be allowed on the export of several kinds of sugar, among others "For double-refined sugar and sugar equal in quality to double-refined sugar," an additional bounty is given. The words used in the 8th section are, "Of a quality not equal to such standard sample;" while in the second the words are, "being of a uniform whiteness throughout."

ERSKINE, J.—What is the standard sample?

Kelly.—There is nothing in the act which requires the

1840.

WACKERBATH v. RICH.

sugar to be of a uniform whiteness throughout; but in point of fact it was: there was only a slight discoloration at the base from the presence of molasses, and that is not what was intended to be guarded against by the words "Of a uniform whiteness throughout." The only question in this case is, whether the sugars were of a quality equal to the standard sample. The argument on the other side is, I suppose, founded on the 7th section, which directs that the standard sample must be of a uniform whiteness throughout.

ERSKINE, J.—It is rather the standard sample must be made from sugar of a uniform whiteness; that is, the sugar must have been of a uniform whiteness throughout, before it underwent the process of double refining.

Kelly.—By an order of a learned Judge it is admitted, on the part of the plaintiffs, that the defence shall be given in evidence under the general issue (*a*), and also that the sugar was entered for the bounty; and on the part of the defendant, the property of the plaintiffs in the sugar and the seizure by the defendant are both admitted.

A clerk of the plaintiffs' produced half a lump of sugar, and said it was equal to double-refined and to the standard sample. On his cross-examination by *Spankie*, Serjt., for the defendant, he said—"This is not part of the sugar delivered, but it is part of one of the same day's work; the usual way of examining is, to cut sometimes across and sometimes down the middle; there was a grey mark which prevented its being of a uniform whiteness throughout; stoving is to dry up the moisture; when it goes down towards the base, and the discolouration appears, we call it water on the face; it is very seldom seen without it; I was present at the examination, and there was a standard

(*a*) See note (*a*), ante, p. 699.

loaf there; the loaf cut down had a rim of greyish colour similar to this; there were several different examinations of the sugar on different days; there was only one Custom-house officer; I was present at an examination by Mr. Holthouse, Mr. Plaxton, &c., and almost all the leading gentlemen in the trade; I should say the standard loaf had a discoloration, but I did not see the face of it, and I cannot speak positively; the standard loaf was not split down, and so I could not see the base. [By *Erskine*, J.—If the narrow part was cut off it would give the best test whether the sugar was pure or not.] By stoving the moisture is driven towards the centre from the heat; the discoloration does not arise from a slovenly mode of drying; I should say the greyish mark cannot be avoided in this quality of sugar; I have seen large quantities." On his re-examination the witness said—"There are a great many standard loaves in different places; I have seen some cut down, and some had the greyish discoloration to some extent; most of them had the discoloration to a greater or less extent; I have only examined three, and they had the discoloration. [A loaf which was admitted to be a standard sample was here produced, and the witness continued]—"It is in this, but less, because this is of a smaller bulk; it is by act of Parliament only 14lb., and the loaf of the plaintiffs is from 38lb. to 40lb.; this loaf of the plaintiffs is superior in quality to the standard sample without a doubt; some of those sent were still better. The defendant admitted at the time that they were of a better quality than the standard sample."

ERSKINE, J.—Is it intended to be said, to-day, that the sugar was not of the quality of the standard sample?

Spankie, Serjt.—I do not mean to contend that it is not even of better quality; but I say that will not do. I do not mean to shew that the sugar was inferior, as sugar,

1840.

WACKERBATH v. RICH.

to the standard quality: it may or may not have been; w go by visible tests.

Mr. Plaxton, a Colonial agent and merchant, who ha been a sugar-refiner for thirty years, and was for sever years on the Committee of Sugar Refiners was called as witness and said, "I took samples of the plaintiffs' sugar which were seized by the defendant, and examined them thoroughly; we split about fifty lumps; Mr. Holthous Mr. Manning, the defendant, and the landing waiter wer there; I had an order from the Board of Trade to inspec the sugar; the quality of the whole was very good; it wa much superior to the standard sample in quality and va lue; if the sugar had not been properly refined the defec would have appeared at the small end; if any molasses o other impurity were left in it, it would appear at that par of the cone; there was a slight discoloration near the bas of what I examined at the Custom-house, it was cause by the moisture settling down, which will leave a mark particularly in strong sugar; the discoloration near th base has nothing whatever to do with the quality of th sugar; I have seen a great many standard samples, an they have shewn that discoloration at the base; th quality of the plaintiffs' lump is superior to the standar sample."

ERSKINE, J.—Brother *Spankie*, can you after this s that this is within the act of Parliament?

Spankie, Serjt.—Yes, my Lord, I can. The word qu lity is used with reference to those tests which the act Parliament requires.

The witness continued—"The discoloration is percep tible in the smaller or standard sample; taking into a count the difference in size, it is as perceptible in th smaller as the larger; the same filling would be necess

rily of the same quality; there was not one defective of the number I examined."—In answer to questions from *Spankie,* Serjt., he said "The moisture in stoving goes downwards in a slight degree; I never saw a lump of refined sugar of one uniform whiteness."

ERSKINE, J.—That may be, construing the act of Parliament as I do. It cannot mean discoloration not arising from impurities. The object of the legislature was, that double-refined sugar should be pure sugar; and though it says, that the refined sugar from which it is made must be of a uniform whiteness, that must be taken to be of one uniform whiteness, according to the subject-matter, and does not mean that every loaf or lump must be free from all discoloration.

Several other witnesses were called on the part of the plaintiffs, and the case eventually went to the jury, who found a

Verdict for the plaintiffs—Damages £60.

F. Kelly, and *Cleasby,* for the plaintiffs.

Spankie, Serjt., and *Barlow,* for the defendant.

[Attornies—*Hindman & Howard,* and *J. G. Walford.*]

1841.

COURT OF QUEEN'S BENCH.

Sittings at Westminster after Hilary Term, 1841.

BEFORE LORD DENMAN, C. J.

Doe on the Demise of Pittman *v.* Sutton and Others.

Feb. 13.

A covenant, "forthwith" to put premises into complete repair, must receive a reasonable construction, and is not to be limited to any specific time; and therefore it will be for the jury to say upon the evidence, whether the defendant has done what he reasonably ought in the performance of it.

A lessee covenanted to insure, and the premises were uninsured for a week:—*Held*, in an ejectment for a forfeiture for a breach of this covenant, that the lessor could not recover if he, by his conduct, had led the lessee to believe that the premises were properly insured by himself.

EJECTMENT to recover premises in the parish of St. Martin's-in-the-Fields.

It was opened by *F. Robinson* for the plaintiff, that this ejectment was brought by the lessor of the plaintiff as landlord of the house, No. 69, Strand, and a house in Theobald's Court, against the defendant Sutton, by reason of the forfeiture of the lease by breaches of covenant in not putting the premises into "complete and substantial repair," and in not keeping the premises insured; and that the defendant Sutton had been in possession of the premises since the year 1838, although the lease was not granted till the year 1840.

The lease of the premises, dated the 18th of March, 1840, was put in; it was between the lessor of the plaintiff of the one part, the defendant Sutton of the other part, and by it the property was demised by the former to the latter for twenty-one years from the 24th of June, 1838. This lease contained a covenant that the lessee would "forthwith" put the premises "into complete and substantial repair," and keep them "in good

A lease (among other covenants) contained a covenant by the lessee to insure, with a proviso that if he did not do so the lessor might insure and distrain on the lessee for the premiums. The lease contained the usual proviso as to forfeiture. Whether the lessee's omitting to insure would incur a forfeiture—*Quære?*

1841.

DOE d. PITTMAN v. SUTTON.

and substantial repair;" and also a covenant that the lessee would insure them and keep them insured in the Westminster Fire-office, or in some other office to be approved by the lessor, for £2500, in the joint names of the lessor and lessee; and that if the lessee made default in insuring, the lessor might do so, and charge the lessee with the premiums, and recover them by distress. The lease also contained the usual proviso of re-entry for breach of any covenants contained in the lease.

With respect to the insurance, it was proved, that, in the years 1838 and 1839, the premises had been insured for £2500 in the Westminster Fire-office, in the name of the lessor of the plaintiff only, and that the policy was allowed to expire on the 7th of October, 1839, and that the premises remained uninsured till the 18th of October following, when they were insured by the lessor of the plaintiff in the joint names of himself and Sutton. But it was also proved, that, in the years 1838 and 1839, the premiums of the insurance were paid after the policy had been allowed to expire, and that the lessor of the plaintiff had paid 10*s.* 4*d.* additional for the new policy in 1840, which had been repaid him by the defendant Sutton; and it was also proved, that the notices of the premiums becoming due had been always sent to the solicitors of the lessor of the plaintiff, and there was no evidence that they had ever been transmitted to the defendant.

With respect to the repairs, it was proved by Mr. Mayhew, the surveyor of the Westminster Fire-office, that the premises were not in repair, as one of the chimneys had bulged; a drain was stopped; some iron stays were wanting to support a chimney shaft; the roof of a room at the back of No. 69, Strand, was out of repair; a dormer door was defective; the floor of one of the rooms in No. 69, Strand, was shored up; two ridge tiles were broken, and some weather-boarding required repair; and a window was broken. But this witness could not state what amount of repairs was needed.

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Thesiger, for the defendant.—I submit that the non-insurance cannot work a forfeiture of this lease; because it is expressly provided, that, if the lessee makes default in insuring, the lessor is to do it, and distrain for the premium.

Lord DENMAN, C. J.—I shall reserve that point if it shall become necessary.

On the part of the defendant, a letter from the solicitors of the lessor of the plaintiff to the defendant Sutton was put in, dated in the year 1839, in which they stated, that the lease could not be granted till the defendant Sutton had shewn by receipts that he had expended £500 in repair on the premises; and a surveyor was called, who stated that as much as £500 had been expended by the defendant Sutton on repairs, and that the bulging of the chimney was caused by an under-tenant keeping granite to the extent of several tons weight on the floor, which was shored up, and that this did not arise from want of repair. And this witness also stated, that the roof of the room was sufficient to go through the winter, and that he had advised the defendant Sutton to delay its repair till the spring; and that he saw no fault in the drainage, and believed that the iron stays were not deficient.

Lord DENMAN, C. J., (in summing up).—Upon this covenant to repair having a reasonable construction put upon it, you will have to say whether or not the defendant has or has not performed it. It is absurd to attempt to construe this covenant according to the strictest view of it, because it is impossible. The word is "forthwith," which cannot here mean either a day or a week; and you must say, on such reasonable construction of the terms of the covenant, whether the defendant Sutton has really done what he reasonably ought in the performance of it. With respect to these premises being uninsured for a

week, it appears that the insurance had previously been in the name of the lessor of the plaintiff, and the notices always sent to his solicitors, and, as far as we know, never transmitted to the defendant, the policy always remaining in the name of the lessor of the plaintiff only; you will therefore consider, whether the lessor of the plaintiff by his conduct led the defendant Sutton to believe that the premises were insured by him; for, if the lessor by his conduct led the lessee to believe that the premises were properly insured, he cannot come on the tenant for a forfeiture by reason of their not being insured (*a*).

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Verdict for the defendant.

C. Cresswell and *F. Robinson*, for the plaintiff.

Thesiger, *N. Clarke*, and *Fry*, for the defendant.

[Attornies—*Trinder & Co.*, and *Cross*.]

(*a*) See the case of *Doe* d. *Knight* v. *Rowe*, ante, Vol. 2, p. 246.

Adjourned Sittings in London after Hilary Term, 1841.

BEFORE MR. BARON PARKE.

(*Who sat for the Lord Chief Justice.*)

HORN *v.* BENSUSAN.

Feb. 22nd.

ASSUMPSIT.—The declaration contained a common count for demurrage, but no special count. Plea as to all

If there be no contract as to demurrage a a shipowner cannot, on a common count for demurrage, recover for the detaining of the ship for an unreasonable time in loading and unloading, but must declare specially.

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but the sum of 39*l.* 7*s.* 6*d.*, non assumpsit, and as to that sum a tender and payment of it into Court.

It appeared that Mr. Walker, the plaintiff's ship-broker, had sent a charter-party to the defendant's ship-broker, in which thirty days were allowed for discharging the cargo, and no express provision made as to loading; and that a few days afterwards a copy of this charter-party was returned by the defendant's ship-broker with the alteration of thirty days for loading and thirty for discharging, instead of thirty days for discharging only. The plaintiff's broker altered it to one term of thirty days and the plaintiff signed it as owner of the vessel; but the defendant refused to sign it unless the time were thirty-five days, and the defendant's broker altered it to thirty-five days and returned it to the plaintiff's broker, at the same time calling his attention to the alteration. It was proved that the ship was thirty-seven days in loading and unloading, and it was admitted that the amount claimed for two days' demurrage was paid into Court.

Thesiger, and *R. Gurney*, for the defendant, submitted that the written contract was put aside and made entirely void by the different alterations made in it.

Campbell, A. G., and *Hoggins*, for the plaintiff, contended, first, that the plaintiff was entitled to recover for demurrage for every day beyond thirty, as that was the number specified in the contract under which the plaintiff undertook the voyage; and, secondly, that if the contract was entirely avoided by the alterations made in it, the plaintiff was entitled to be paid for all demurrage beyond a reasonable time for loading and unloading, which would be shewn to be thirty days.

Thesiger.—If there be no contract, the plaintiff cannot go into evidence of a detaining of the ship beyond a reasonable time on the common counts. To entitle the plaintiff to go into that, there should have been a special count

in the declaration for not loading and unloading in a reasonable time.

Campbell, A. G.—It will be a question for the jury what the implied contract between these parties was. If the jury find that it was as we put it, the plaintiff will be entitled to recover in this action.

PARKE, B.—I entertain no doubt on this point. To entitle the plaintiff in this case to recover for delaying the ship beyond a reasonable time, a special count was necessary.

Verdict for the defendant on the first issue, and for the plaintiff on the second.

Campbell, A. G., and *Hoggins*, for the plaintiff.

Thesiger, and *R. Gurney*, for the defendant.

[Attornies—*Chisholme & Co.*, and *Arnold & B.*]

1841.

First Sittings at Westminster in Easter Term, 1841.

BEFORE MR. JUSTICE COLERIDGE.

CHAPMAN *v.* EMDEN.

In assumpsit by the marshal of the Queen's Bench prison, the declaration stated that in consideration that the plaintiff would allow J. W., a prisoner for debt, to reside within the rules, the defendant promised to indemnify the plaintiff from any escape of J. W. That the plaintiff did allow J. W. to reside in the rules, and that he escaped, and the plaintiff was obliged to pay the amount for which J. W. was imprisoned and other expenses.

ASSUMPSIT.—The declaration stated, that the plaintiff before the making of the promise of the defendant hereinafter mentioned was marshal of the Marshalsea of the Court of our late Lord the King, before the King himself, and still is marshal of the Marshalsea of the Court of our Lady the Queen, before the Queen herself; and that in Michaelmas Term, 7 Will. 4, in the said Court, Henry Merry and Theophilus Merry obtained a judgment against James Wright for £400, for damages, and 12*l.* 12*s.* for costs, and that James Wright was taken on a ca. sa.; and being brought before Mr. Justice *Patteson*, on habeas corpus, was committed to the custody of the plaintiff as marshal in execution on the said judgment, and was in his custody, of all which the defendant had notice; and that in consideration that the plaintiff would permit and suffer J. Wright to reside and be within the rules of the said prison during his imprisonment, the defendant promised the

Plea, that A., the execution creditor and others, conspired to cause another creditor of J. W. to sue out a bailable writ against J. W., and to cause him (if he should go beyond the rules) to be arrested and detained out of the rules till A. could commence an action against the marshal for the escape of J. W., and that in pursuance of that conspiracy a bailable writ was sued out by L., a creditor of J. W., and a warrant granted thereon, upon which J. W. was arrested and detained out of the rules till the marshal was sued for the escape; and that J. W. could and would have returned into the rules before any action could have been commenced against the marshal if he had not been so arrested; and that the plaintiff well knew the premises, and would not plead the same as a defence to A.'s action against him, and would not allow the defendant to defend that action.

Replication, admitting the writ and warrant, with de injuriâ as to the residue:—*Held*, that on these pleadings the defendant should begin, notwithstanding that the plaintiff would have to prove the amount of his damages if the defendant failed in proving his plea.

The rule of the Judges as to the right to begin does not extend to actions of covenant; and semble, that it does not extend to any cases of contract.

Semble, that the Court above would grant a new trial, if the Judge allowed a party to begin who had not a right to do so.

plaintiff, then being such marshal, to indemnify the plaintiff, then being such marshal, from any escape or escapes of the said James Wright, and to reimburse the plaintiff all loss, costs, charges, damages, and expenses which the plaintiff might bear, pay or expend, or be put unto by reason of any action, suit or motion which might be brought, commenced or made against the plaintiff for any escape or escapes of the said James Wright, or any misconduct of the said J. W., while residing in the said rules as aforesaid. The declaration then went on to aver, that the plaintiff did permit James Wright to reside in the rules, and that afterwards, without the knowledge and against the will of the plaintiff, the said J. W. escaped out of the custody of the plaintiff, whereby the plaintiff became liable to pay to the said H. Merry and T. Merry, the sum for which the said J. W. was charged in execution; and the declaration went on further to aver, that while J. W. was out of the rules, H. and T. Merry sued out a writ of summons against the plaintiff in an action of debt, for the sum for which J. W. was charged in execution, and that they recovered that amount, and also *77l.* 8*s.* 8*d.* for costs, and that the plaintiff was obliged to incur expense to the amount of £145, in the defence of that action (*a*); yet the defendant, not regarding his promise, would not indemnify the plaintiff or reimburse the sums he had been obliged to expend, and although the defendant had paid to the plaintiff a sum of £40, yet that the residue of the before-mentioned sums was still unpaid.

Plea, that after the said J. W. had been committed to the custody of the plaintiff as marshal, as in the declaration mentioned, and after the making of the promise in the declaration mentioned, and after J. W. was permitted to reside in the rules as in the declaration mentioned, one J. M. G. Underhill, the said H. Merry and T. Merry, and G. Rutland, intending to injure the defendant and make him

(*a*) See the case of *Merry* v. *Chapman*, 3 Per. & D. 25.

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liable to pay to the plaintiff as marshal the amount for which J. W. was in execution, and to obtain from the plaintiff or from the defendant the said amount, did, together with divers other evil disposed persons, conspire, combine, confederate, and agree together to cause some other creditor of J. W. to sue out a capias ad respondendum against J. W., and cause him to be arrested if he should go beyond the rules, and whilst he was out of the rules to cause him to be arrested and detained out of the rules under the last-mentioned writ, until H. Merry and T. Merry should be enabled to commence an action against the plaintiff for the escape of J. W., and to sue out and serve a writ of summons on the plaintiff in that behalf. The plea then stated as an overt act of the conspiracy, that H. Merry and T. Merry, and J. M. G. Underhill, did cause T. B. Lefevre, who was a creditor of J. W., for a debt exceeding £20, to wit, 158*l.* 6*s.* 8*d.*, to sue out a writ of capias against J. W., indorsed for bail to the amount of 158*l.* 6*s.* 8*d.*, and that this writ was directed and delivered to the sheriff of Surrey, who granted his warrant to G. Rutland, who, with J. M. G. Underhill, waited and watched till they saw J. W. pass the bounds of the rules and escape ("which is the same escape in the said declaration mentioned"), and that G. Rutland immediately arrested J. W., and gave notice of the arrest to J. N., who was the attorney of H. Merry and T. Merry in the action they had brought against J. W.; and the plea stated as a further overt act of the conspiracy, that G. Rutland refused to take J. W. to the prison of the sheriff of Surrey, situate within the rules, though required by J. W. to do so, but in pursuance of the conspiracy detained J. W. in the custody of the said sheriff, out of the rules, until H. Merry and T. Merry, by J. N. their attorney, had sued out and served the writ of summons in the declaration mentioned on the plaintiff, as such marshal as aforesaid; and the plea went on further to state, that if J. W. had not been so arrested and detained by G. Rutland,

he could and would have voluntarily returned within the rules before any action for the said escape could have been commenced, and would then have stayed and remained within the rules; and the plea went on further to aver, that the plaintiff well knew all the premises hereinbefore stated, and might have pleaded the same in defence of the action brought against him, but he refused and neglected to plead the same as such defence as aforesaid, and wholly refused to permit the defendant to defend the said action, in the name of the plaintiff, although the defendant offered to do so at his the defendant's sole expense; but the plaintiff neglected altogether to plead such defence as aforesaid, by reason whereof alone judgment was given in the said action against the plaintiff, and the plaintiff was adjudged to pay the debt and costs, and did incur the other charges as in the declaration is stated (concluding with a verification).

Replication, "That although true it is that the said writ of capias ad respondendum was sued out against the said J. W., directed to the said sheriff of the county of Surrey, and that the said warrant thereon was obtained directed to the said G. R. as in the said plea is alleged, yet that the defendant of his own wrong, and without the residue of the cause or matters of excuse by him in his said plea alleged, broke his said promise and undertaking in the said declaration mentioned, in manner and form as the plaintiff hath above thereof complained against him," (concluding to the country).

Kelly, for the defendant, claimed the right to begin, as the proof of the issue lay on the defendant.

Campbell, A. G., for the plaintiff.—I submit that this is not one of the cases in which the defendant should begin, as the damages are unliquidated and unascertained. There is no reason for calling on the defendant to begin. The plaintiff must be compelled to give evidence, even if the

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defendant fails in making out his plea, as the plaint must shew the amount of his damages. In the case *Absalom* v. *Beaumont* (*a*), Lord *Denman* is said to ha ruled that "wherever any affirmative proof lies on t plaintiff to shew what damages he is entitled to, he has right to begin." That case was an action on a poli against fire, and all the pleas were affirmative; and h Lordship is said to have distinguished the case from a li insurance, where the sum is ascertained. And in the ca of *Cann* v. *Facey*, at the Exeter Summer Assizes, 1835 (*b* which was an action for shooting a dog, which the d fendant justified, to prevent it from trespassing, Bar *Gurney* held, that the plaintiff was entitled to begi though the defendant offered to admit the value of t dog; for, per *Curiam*, "the plaintiff may have damages b yond that amount;" and a similar ruling by Lord *Tente den* was cited. So in the case of *Mills* v. *Stephens*, tri at the Exeter Spring Assizes, 1838 (*c*), Mr. Justice *Bosa quet* held that the plaintiff was entitled to begin in a ca of trespass for breaking into his house, where the pl was leave and licence. Here the plaintiff is bound affir atively to prove the amount of the damages, although t issue on the record is on the defendant.

Kelly cited the cases of *Carter* v. *Jones* (*d*) and *Reeve* *Underhill* (*e*).

COLERIDGE, J.—There is a note in Carrington & Payne (in which the whole matter is gone into.

Kelly.—The case of *Aston* v. *Perkes* (*g*) is also an a thority in my favour.

(*a*) 1 M. & Rob. 441.
(*b*) Cited Ros. on Ev. 5th Ed. 176.
(*c*) Cited Ib.
(*d*) Ante, Vol. 6, p. 64.
(*e*) Ante, Vol. 6, p. 773.
(*f*) Ante, p. 232.
(*g*) Ante, p. 231.

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COLERIDGE, J.—I think that the defendant must begin, and that the plaintiff must give evidence as to the amount of damages afterwards as part of his case. The rule of the Judges (*a*) does not apply to actions of this sort; indeed (as I understand) it does not apply to any cases of contract, though certainly the decisions are not uniform. However, I have great satisfaction in thinking, that now I may be set right if either party is injured by my decision on this point (*b*).

The defendant began, and as he failed in proving his plea there was a

Verdict for the plaintiff, damages £350.

Campbell, A. G., and *Hoggins*, for the plaintiff.

Kelly, *Archbold*, and *Montagu Chambers*, for the defendant.

[Attornies—*C. Chester*, and *Branscomb*.]

(*a*) Referred to in the case of *Carter* v. *Jones*, ante, Vol. 6, p. 64.

(*b*) See the case of the *School Trustees of Worcester* v. *Rowlands*, ante, p. 734.

PROMOTION.

IN the Vacation after Hilary Term, 1841, *William Wightman*, Esq., was appointed one of the Judges of the Court of Queen's Bench vice Sir *Joseph Littledale*, Knight, resigned.

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OXFORD SPRING CIRCUIT, 1841.

BEFORE MR. BARON GURNEY AND MR. JUSTICE COLERIDGE.

READING ASSIZES.

(Civil Side.)

BEFORE MR. BARON GURNEY.

FOSTER *v.* POINTER.

Feb. 25th.

In an action for a libel the declaration stated, that the defendant published a libel, "*contained in, and being an article, in a certain weekly printed publication, or paper, called the Paul Pry.*" At the trial it was proved that the defendant gave a printed slip of paper, which appeared to have been cut from the Paul Pry, to several persons for them to read, and that they read it:—*Held*, that the Judge at the trial might properly allow the record to be amended by striking out the above mentioned allegation, that the libel was contained in, and was an article in, the Paul Pry.

LIBEL.—The declaration stated, that the defendant "did publish, and caused and procured to be published, of and concerning the plaintiff, a false, scandalous, malicious and defamatory libel, *contained in, and being an article in a certain weekly printed publication or paper called the Paul Pry*, and containing the false, scandalous, malicious, defamatory, and libellous matter following, of and concerning the plaintiff, that is to say, 'Libertines and professed seducers,'" &c., (setting out the libel.) Plea—not guilty.

Where none of the parties lived in the assize town the plaintiff's attorney served the defendant's attorney in the assize town, on the commission day, with notice to produce a paper, and offered the expenses of going to fetch it. The defendant's attorney said, that that was of no use as the paper was not in existence:—*Held*, that the plaintiff on the trial might give secondary evidence of the contents of the paper, as the statement of the defendant's attorney, that the paper was not in existence, got rid of any objection as to the lateness of the service of the notice to produce.

The stat. 3 & 4 Vict. c. 24, applies to cases of libel, and therefore if in a case of libel nominal damages be given, and the Judge certifies that the grievance was wilful and malicious, the plaintiff will be entitled to his costs.

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It appeared that the defendant had had a printed slip of paper, which appeared to have been about half a column, which had been cut from a newspaper, and that he had taken this slip of paper to the shop of Mr. Brown, a bookseller in Windsor, and had there given it to some persons who had read it. This paper contained the alleged libel.

The commission day at Reading was on Wednesday the 24th of February, and it was proved that on Monday the 22nd, notice had been given to the defendant and his attorney to produce "a certain paper or publication called The Paul Pry, containing the libel mentioned in the declaration;" and it was further proved by Mr. Slocombe, the plaintiff's attorney, that at about three o'clock on the afternoon of Wednesday the 24th, at Reading, he saw the defendant's attorney, Mr. Marlin, of Windsor, and that he then served Mr. Marlin with a notice to produce "a certain printed paper" [describing it as having been produced by the defendant at the shop of Mr. Brown, and commencing with the words 'Libertines and professed Seducers,'] and Mr. Slocombe further said, "I put down five sovereigns, and asked Mr. Marlin to take as much as he thought proper for the trouble and expense of his going or sending a person to Windsor to fetch the paper." Mr. Marlin replied, "It is of no use my going to Windsor after the paper, as it is not in existence."

Talbot for the plaintiff proposed to give secondary evidence of the contents of the paper.

Ludlow, Serjt., for the defendant.—I submit that the plaintiff is not entitled to give secondary evidence of the contents of the paper, as no sufficient notice has been given to produce the original. The first notice is clearly out of the question, as that is to produce the Paul Pry newspaper, which, for aught that appears, the defendant never had. And as to the second notice, I apprehend

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that a notice served in the assize town on the commision day, is not good, unless the parties reside there.

GURNEY, B.—I think that secondary evidence of the contents of the paper is admissible. The defendant's attorney saying that the paper was not in existence, gets rid of the objection as to the lateness of the service of the notice to produce.

A copy of the Paul Pry newspaper was put into the hands of the witnesses, and they stated that the slip of paper handed to them by the defendant contained the same words, and was in the same type as an article in the Paul Pry newspaper, which they pointed out.

GURNEY, B.—What evidence is there that the Paul Pry is a weekly publication, or that the slip of paper produced by the defendant ever formed part of it?

Talbot.—The allegation that the libel was an article in the Paul Pry, is a superfluous allegation.

GURNEY, B.—It is; but have you not made it necessary to be proved, by stating it in your declaration?

Evidence was given that the Paul Pry was a weekly paper, and a copy of it was put in containing the libel.

Talbot applied for leave to amend, by striking out the allegation in the declaration respecting the Paul Pry newspaper.

GURNEY, B.—I will give my Brother *Ludlow* leave to move to enter a nonsuit, but at the same time I must be considered as having made the amendment, if the Court think it is a case in which I ought to allow an amendment.

Verdict for the plaintiff—Damages, one farthing.

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GURNEY, B., certified under the stat. 3 & 4 Vict. c. 24 (*a*), that the grievance for which the action was brought was wilful and malicious (*b*).

Talbot and *John Gray*, for the plaintiff.

Ludlow, Serjt., and *J. Jeffreys Williams*, for the defendant.

[Attornies—*Slocombe* and *Marlin*.]

(*a*) By the stat. 3 & 4 Vict. c. 24, s. 1, the stat. 43 Eliz. c. 6, "so far as it relates to costs in actions of trespass or trespass on the case;" and so much of the stat. 22 & 23 Car. 2, c. 9, "as relates to costs in personal actions," are repealed; and by sect 2 of the stat. 3 & 4 Vict. c. 24, it is enacted, "that if the plaintiff in *any action of trespass, or trespass on the case*, brought or to be brought in any of her Majesty's Courts at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Common Pleas at Durham, shall recover by the verdict of a jury *less damages than forty shillings*, such plaintiff shall not be entitled to recover or obtain from the defendant, in respect of such verdict, *any costs whatever*, whether it shall be given upon any issue or issues tried, or judgment shall have passed by default, unless the judge or presiding officer before whom such verdict shall be obtained shall *immediately* afterwards *certify* on the back of the record, or on the writ of trial or writ of inquiry, that the action was really brought to *try a right* besides the mere right to recover damages for the trespass or grievance for which the action shall have been brought, or that the *trespass or grievance* in respect of which the action was brought was *wilful and malicious*." And by sect. 3 of the same statute it is provided and enacted, "that nothing herein contained shall extend to, or be construed to extend to deprive any plaintiffs of costs in any action or actions brought for a *trespass* or trespasses over any *lands, commons, wastes, closes, woods, plantations, or inclosures, or for entering into any dwellings, outbuildings, or premises* in respect of which any *notice not to trespass* thereon or therein shall have been previously served, by or on behalf of the owner or occupier of the land trespassed over, upon or left at the last reputed or known place of abode of the defendant or defendants in such action or actions."

It should be observed, that these provisions only extend to actions of *trespass* and *trespass on the case*, and not to any other form of action; but ejectments being "actions of trespass in ejectment" [3 Bl. Com. ch. 11] it may be a question whether they are or are not included in these provisions. See the case of *Doe* d. *Hughes* v. *Derry*, ante, p. 494.

(*b*) The certificate was in the following form: "I certify that the grievance for which this action was brought was wilful and malicious. Dated 25th February, 1841.

(Signed) "J. GURNEY."

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IN the ensuing Term, *Ludlow*, Serjt., applied to the Court of Exchequer for a nonsuit on the point reserved, if the Court should think that this was not a proper case for the amendment. He also moved for a new trial on the ground that the notice to produce was not sufficient.

The Court refused a rule on both points, and Baron ALDERSON said, "We think that the declaration was amendable and ought to be amended. It is just one of the cases where there should be an amendment."

On a subsequent day after the plaintiff's costs had been taxed, *Ludlow*, Serjt., applied to set aside the certificate granted under the stat. 3 & 4 Vict. c. 24, on the ground that under that statute the certificate was not grantable in a case of libel. The Court granted a rule to shew cause why the Master should not review his taxation, and "why the certificate of Mr. Baron *Gurney*, indorsed on the record, should not be set aside or withdrawn, and why the record should not be returned by the plaintiff to the Associate for that purpose;" which rule was after argument discharged with costs.

(*Crown Side.*)

BEFORE MR. JUSTICE COLERIDGE.

REGINA *v.* DAY.

On an indictment for attempting to carnally know and abuse a girl under ten years of age, with a count for a common assault. The attempt was proved, but it could not be shewn that the child was under ten years of age, and it also appeared that no violence was used by the prisoner, and no actual resistance made by the girl:—*Held*, that although *consent* on the part of the girl would put an end to the charge of assault, yet that there was a great difference between *consent* and *submission*, and that although, in the case of an adult, submitting quietly to an outrage of this kind would go far to shew consent, yet, that in the case of a child, the jury should consider whether the submission of the child was voluntary on her part, or was the result of fear under the circumstances in which she was placed.

ASSAULT.—The indictment contained two counts, the first of which charged the prisoner with having on the 11th

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of December, 1840, attempted to carnally know and abuse Eliza Massey, a girl under ten years old. The second count was for a common assault.

With respect to the age of Eliza Massey, she herself stated that she was ten years old on the 16th of January, 1841. Her mother was at home ill, and therefore could not attend the trial, and her father proved that Eliza Massey was not born in wedlock, and that he could not precisely state the time of her birth, as he was at that time at work at some distance from the place at which the mother was; and with respect to the assault it was proved by Eliza Massey, that, at about seven o'clock in the evening of the 17th of December, 1840, she was coming up Maidenhead Street, when she met the prisoner, who accompanied her up a dark lane, which was on her road home; that there he made an attempt on her, without any violence on his part, or *actual* resistance on hers; and that on the same evening she told her mother what had happened.

J. J. Williams, for the defendant, submitted that the first count could not be sustained, there not being sufficient evidence that the prosecutrix was under ten years of age at the time the offence was committed.

J. G. Phillimore, for the prosecution, submitted that there was evidence to go to the jury.

COLERIDGE, J.—I think the proof of the age is not sufficient (*a*). Mr. *Williams* had better apply himself to the second count.

J. J. Williams, for the defendant, addressed the jury on the last count of the indictment, and contended, that that count being for a common assault only, consent or non-consent upon the part of the prosecutrix became material,

(*a*) See the case of *Rex* v. *Wedge*, ante, Vol. 5, p. 298.

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and that as it was proved that she offered no resistance, but submitted quietly, it must be taken that she was consenting to the act, and therefore the prisoner must be acquitted (*a*).

COLERIDGE, J., (in summing up).—It has been contended by the learned counsel on behalf of the prisoner, that this case, being now reduced to a charge of common assault only, consent or non-consent on the part of the prosecutrix becomes material; and so indeed it does; but then we must look at the nature of the circumstances from which consent is to be inferred. There is a difference between consent and submission; every consent involves a submission; but it by no means follows, that a mere *submission* involves *consent*. It would be too much to say, that an adult submitting quietly to an outrage of this description, was *not* consenting; on the other hand, the mere submission of a child when in the power of a strong man, and most probably acted upon by fear, can by no means be taken to be such a consent as will justify the prisoner in point of law. You will therefore say whether the submission of the prosecutrix was voluntary on her part, or the result of fear under the circumstances in which she was placed. If you are of the latter opinion, you will find the prisoner guilty on the 2nd count of the indictment.

Verdict—Guilty on the 2nd count only.

J. G. Phillimore, for the prosecution.

J. Jeffreys Williams, for the prisoner.

[Attornies—*Smith* and *Slocombe*.]

(*a*) See the case of *Reg.* v. *Martin*, *ante*, p. 213, and the cases there cited.

1841.

OXFORD ASSIZES.

(*Civil Side.*)

BEFORE MR. JUSTICE COLERIDGE.

BARNES and Others *v.* BUTCHER.

In an action by a banker as indorsee, against his customer as acceptor of a bill of exchange for £67, the defendant pleaded *to the whole declaration* a plea of set-off for money had and received. It was proved that the banker had a balance of £37 in his hands belonging to the defendant, for which latter amount the banker refused to honor the defendant's check, alleging that he held the £37 on account of this overdue acceptance:—*Held*, that the issue on the plea of set-off must be found for the plaintiffs, because it was pleaded to the whole declaration, and not pleaded as to 37*l.* only, but that the jury ought to allow the £37 in reduction of the damages.

ASSUMPSIT by the plaintiffs as indorsees against the defendant as acceptor of a bill of exchange, dated the 10th of October, 1840, for 67*l.* 18*s.* 9*d.*, drawn by a person named Gandell, on the defendant, payable two months after date, to the order of the drawer. The declaration also contained a count upon an account stated. Pleas, first, a denial of the acceptance; second, a denial of the indorsement; third, as to £37, a payment of that sum; fourth, to the second count, non-assumpsit; fifth, *to the whole declaration*, a set-off to the amount of £250, for money lent, money had and received, and on an account stated.

On the part of the plaintiffs, the bill of exchange which was admitted under a judge's order was put in.

The bill became due on the 13th December, 1840.

For the defendant, Mr. Reynolds, the cashier of the plaintiffs, who were bankers at Farringdon, was called; he stated that the defendant kept an account with the plaintiffs as his bankers. The plaintiffs' books containing the accounts were called for under a notice to produce, and not being produced, the witness further stated that at the time when this bill became due, the defendant had a balance in the plaintiffs' hands of about £37, and that in the beginning of the month of January, the defendant drew a check for the £37, which the plaintiffs would not pay.

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In his cross-examination by *Ludlow*, Serjt., for the plaintiffs, the witness stated that the plaintiffs would not pay the check, "because they held the £37 on account of this overdue bill."

Ludlow, Serjt., for the plaintiffs.—The defendant cannot avail himself of this £37 on these pleadings. The set-off is pleaded to the whole demand, not to the amount of £37 only. The issue on that plea must be found for the plaintiffs.

COLERIDGE, J.—It must; and the defendant must have the benefit of the £37 in reduction of damages, on the plea of payment.

Ludlow, Serjt.—I submit that the plaintiff is entitled to recover the whole amount, and from the case of *Tuck* v. *Tuck* (*a*), it appears that the defendant must bring a cross action for the £37.

Carrington, for the defendant.—The case of *Tuck* v. *Tuck* only decides, that, if a set-off be pleaded to the whole declaration, and the proof of it only goes to part, the issue must be found for the plaintiff, but in that case the defendant had the advantage of the set-off in mitigation of damages.

COLERIDGE, J.—Suppose that the bill had been put in

(*a*) 5 M. & W. 109. In the case of *Tuck* v. *Tuck*, it was held, that where a defendant, under a plea of set-off *to the whole declaration*, proves a sum owing to him from the plaintiff less than the amount of the claim that the plaintiff has established, the defendant is not entitled to have a verdict entered for him on that issue for the amount which he has so proved, but the issue must be found for the plaintiff, unless where the defendant, by all his pleas taken together, covers the whole cause of action, and in those cases in which a defendant does not do so, his proper course is to plead the set-off only as to so much as he can prove.

with the payment written off it, do you say that the jury should give you a verdict for the whole amount?

Ludlow, Serjt.—The payment would then appear on the plaintiffs' evidence.

COLERIDGE, J.—It cannot signify by what evidence it appears, if the fact be proved to the satisfaction of the jury. I shall advise the jury to deduct the £37, the plaintiffs on this evidence have paid themselves that sum on account of the bill.

Verdict for the plaintiff for the amount of the bill and interest, after deducting the £37.

Ludlow, Serjt.—I hope your Lordship will allow me to apply to the Court of Queen's Bench to increase the amount of verdict.

COLERIDGE, J.—I will give you leave to move to increase the damages, as it may save the parties the expense of coming down again (*a*).

Ludlow, Serjt., and *F. V. Lee*, for the plaintiffs.

Carrington, for the defendant.

[Attornies—*Wane* and *Wasbrough*.]

(*a*) No motion was made.

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(*Crown Side.*)

BEFORE MR. BARON GURNEY.

REGINA v. POOL.

A prisoner who is tried for manslaughter on the coroner's inquisition, may be convicted of an assault under the 11th sect. of the stat. 1 Vict. c. 85.

MANSLAUGHTER.—The prisoner was charged on the coroner's inquisition with manslaughter, in having killed William Wicks, by striking and beating him. The grand jury had ignored the bill of indictment which had been preferred against the prisoner for this alleged manslaughter.

As soon as the prisoner had been arraigned,

Rickards, for the prosecution, stated that the cause of the death of the deceased could not be sufficiently ascertained, and he therefore proposed not to offer any evidence.

GURNEY, B.—Taking that to be so, we should have evidence as to the blows, because on this inquisition the prisoner may be convicted of an assault under the 11th section of the stat. 1 Vict. c. 85 (*a*).

The case proceeded, but there being no evidence of any assault except a declaration of the deceased, which the

(*a*) By 7 Will. 4, 1 Vict. c. 85, s. 11, it is enacted, "that on the *trial* of any person *for any felony whatever, where the crime charged shall include assault*, the jury may acquit of the felony, and find the party guilty of an assault, if the evidence shall warrant such finding; and the party may be imprisoned for any term not exceeding three years, and hard labour may be added, and also solitary confinement, not exceeding one month at a time, or three months in any one year."

learned Baron held to be inadmissible, as not being in articulo mortis,

The prisoner was acquitted.

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REGINA v. POOLE.

Rickards for the prosecution.

[Attorney—*Cooper*.]

WORCESTER ASSIZES.

(Crown Side.)

BEFORE MR. BARON GURNEY.

REGINA *v.* GEORGE PRICE and RICHARD PRICE.

A. & B. were charged under the stat. 7 & 8 Geo. 4, c. 30, s. 17, with setting fire to a wood. It appeared that they set fire to a summer-house, which was in the wood, and that from the summer-house the fire was communicated to the wood:—*Held*, that A. & B. might be properly convicted on this indictment.

THE prisoners were indicted for setting fire to a wood under the 7 & 8 Geo. 4, c. 30, s. 17.

It appeared that the prisoners set fire to a summer-house, which was built of brick, thatched, and open, and was at the distance of several hundred yards from the house of the prosecutor, and therefore not falling within the term "outhouse." The summer-house was in the wood, and some of the trees overhung it, and their branches were burnt by the fire, which consumed the summer-house, and also burnt some of the trees.

Whateley, for the prosecution, in his opening said, that although the setting fire to the summer-house was not a felony, still it was an unlawful act, and as the probable consequence of that unlawful act was the burning of the trees, the prisoners were just as guilty as if they had set the trees on fire with their own hands.

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GURNEY, B., (in summing up).—The prisoners are indicted for setting fire to a wood; now if they were guilty of setting fire to the summer-house, and by that means the wood was burnt, they are guilty of the offence charged, for it is quite immaterial by what means it was effected.

Verdict—Guilty.

Whateley and *Domville* for the prosecution.

[Attorney—*Barneby*.]

REGINA *v.* CURNOCK and STEPHENS.

March 8th.

An indictment for assaulting a gamekeeper with a weapon (under the stat. 9 Geo. 4, c. 64, s. 2), stated that the defendants were in certain land of J. R. Earl of B. by night, armed with guns, for the purpose of destroying game, and that they were "then and there in the said land by night as aforesaid by one W. R., the servant of the said J. R. Earl of B., then and there having lawful authority to seize and apprehend the said [defendants] found," and that the defendants with the guns assaulted and offered violence to W. R.:—*Held*, that the indictment was bad, as it did not sufficiently shew that the defendants, when found by W. R., were committing any offence against the stat. 9 Geo. 4, c. 64.

ASSAULTING a gamekeeper with a weapon.—The first count of the indictment (*a*) was in the following form:—

"The jurors for our Lady the Queen, upon their oath present, that John Stephens, late of the parish of Madresfield, in the said county of Worcester, labourer, and William Curnock, late of the same parish, labourer, on the 3rd day of January, 4 Vict., about the hour of two in the night of the same day, at the parish aforesaid, in the county aforesaid, by night did unlawfully enter certain inclosed land in the occupation of John Reginald Earl Beauchamp there situate; and were by night then and there unlawfully in the said land armed with certain guns, then and there for the purpose of taking and destroying

(*a*) This count was intended to be framed under the second section of the Poaching Act 9 Geo. 4, c. 69, which makes this offence a transportable misdemeanour.

game; and that the said John Stephens and the said William Curnock were then and there in the said land by night as aforesaid, by one William Ryall, the servant of the said John Reginald Earl Beauchamp, (the said William Ryall then and there having lawful authority to seize and apprehend the said John Stephens and the said William Curnock) found, and that the said John Stephens and the said William Curnock with the guns aforesaid, which they the said John Stephens and William Curnock in both their hands then and there held, did then and there unlawfully assault, beat, and offer violence towards the said William Ryall, the said William Ryall then and there being lawfully authorized to seize and apprehend the said John Stephens and the said William Curnock, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen her crown and dignity." Second count, for a common assault. The defendants were found guilty.

Godson, for the defendant Stephens in arrest of judgment.—The first count of this indictment is bad. Unless the defendants were found committing the offence the gamekeeper had no right to apprehend them. Now the indictment neither states that they were found committing the offence in the words of the act, nor sufficiently refers to the previous averments.

GURNEY, B.—Mr. Lee, what have you to say to this objection? Does the indictment sufficiently shew that the defendants were found committing the offence?

F. V. Lee and *Whitmore*, for the prosecution.—The first part of the indictment alleges that the defendants entered and were in the land by night, and the second part sufficiently refers to the first part to incorporate it within it. The words "then and there by night as aforesaid," by reference to the previous part of the indictment suffici-

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ently incorporate the purpose for which the defendants were there.

Godson.—The case of *Davies* v. *Rex* (*a*) shows, that the words "then and there" only mean on the day and year aforesaid, at the parish aforesaid, in the county aforesaid; and the other words are not sufficient to incorporate the previous part of the indictment with the allegation in question.

Greaves, on the same side.—The cases of *Davies* v. *Rex* (*b*), and *Reg.* v. *Nicholas* (*c*), are clear authorities to shew that the words "then and there" only refer to the day and parish previously mentioned, and "by night as aforesaid," only carries it one step further, and refers to the night *generally*. In *Reg.* v. *Wilkes* (*d*), which was a case on the 9th section of the statute, I objected, that, although the indictment was that the said A. B. &c. "then and there by night as aforesaid," being armed, it was insufficient, because it did not insert the words "at the time when they were in the land," and although Baron *Parke* did not hold the objection fatal, still he clearly thought it entitled to great weight as he desired that the words might in future be inserted. Now that was a much nicer objection than this, because there "as aforesaid" must refer to the time previously mentioned, here "as aforesaid" is said to refer to the purpose previously mentioned. The only thing "as aforesaid" can refer to is "night," for "then and there" are themselves words of reference. The indictment should either have averred that the defendants were found committing the said offence, or that they were found by night in the land armed as aforesaid for the purpose aforesaid.

W. J. Alexander for the defendant Curnock.—The sta-

(*a*) 10 B. & C. 89.
(*b*) Ib.
(*c*) *Ante*, Vol. 7, p. 538.
(*d*) Id. p. 811.

tute only authorizes the gamekeeper to apprehend persons who are then committing an offence against its provisions. The present indictment does not show that that was so, and it is as I submit therefore bad.

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GURNEY, B.—As this is the first indictment that has come before me upon this section of the act of Parliament I will consider the point and give judgment to-morrow.

Baron GURNEY said, "I have considered the objection, and am of opinion that it is a good one, and the judgment must therefore be arrested on the first count of the indictment. *March 9th.*

Judgment arrested on the first count, the defendants being sentenced on the second count.

F. V. Lee and *Whitmore* for the prosecution.

Godson and *Greaves* for the defendant Stephens.

W. J. Alexander for the defendant Curnock.

[Attornies—*Clark & Skey* and *Reece*.]

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WORCESTER CITY ASSIZES.

BEFORE MR. JUSTICE COLERIDGE.

Doe on the demise of the Trustees of the Schools and Almshouses of the City of Worcester *v.* Rowlands.

In an action of covenant the declaration stated, that the defendant covenanted to occupy demised premises in a proper manner, and to keep them in repair. Breaches—that the defendant did not occupy in a proper manner, and did not keep the premises in repair. Plea—that the defendant did occupy in a proper manner, and did keep the premises in repair:—*Held*, that on these issues the plaintiff had the right to begin.

In an action of covenant for non repair of premises, held by the defendant under a lease which has several years to run, the proper measure of damages is not the amount that would be required to put the premises into repair; but the amount to which the reversion is injured by the premises being out of repair.

A tenant's allowing a footpath to be made across a part of demised premises, is no breach of a covenant to occupy the premises in a proper manner.

COVENANT.—The declaration stated that the plaintiffs had, on the 14th of June, 1808, demised to the defendant certain premises, consisting of a warehouse, a stable and garden-ground, situate at the Butts, in the city of Worcester, for the term of forty-one years from Lady Day, 1806, at a rent of £12 a-year; and that the defendant, in and by the said lease, covenanted to occupy the premises in a proper manner, and well and sufficiently to repair and uphold the buildings demised; and, if necessary, to rebuild the warehouse, and also to keep in repair the pales and fences. Breach—that the defendant did not well and sufficiently repair and uphold the buildings, and keep in repair the pales and fences, and that he did not occupy the demised premises in a proper manner. Pleas—that the defendant did well and sufficiently repair and uphold the building, and did keep in repair the pales and fences, and also that he did occupy the demised premises in a proper manner.

Talfourd, Serjt., for the defendant, claimed the right to begin.

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Ludlow, Serjt., for the plaintiffs.—I submit that the plaintiffs must begin, by shewing in what respect the defendant has broken his covenant. One of the issues is, whether the defendant has occupied in a proper manner. If the defendant is to prove good occupation, he must prove all that he has ever done from the beginning of his lease; and when he has proved ninety nine things done, which the plaintiffs care nothing about, the defendant then comes to the hundredth, which is the real matter in dispute; and on the covenant to repair, the defendant will have to prove all that he has done, and that may be for the most part what we do not complain of.

COLERIDGE, J.—If there was no evidence offered on either side, which party would have the verdict?

Ludlow, Serjt.—I apprehend that that is not always the criterion, but that the question is, who is the substantial actor.

Talfourd, Serjt.—That way of putting it would always give the plaintiff the right to begin, as the plaintiff is always the actor in seeking damages. The decisions are not all of them easily reconciled; but at the last sittings there was an action of covenant against a master for not properly teaching his apprentice, and he pleaded that he did properly teach him; and the Lord Chief Justice *Tindal* held that there was no issue on the plaintiff. My brother Channel was on the one side, and my brother Bompas on the other.

COLERIDGE, J.—There was a case at Bristol, where the question was, whether a horse was sound (*a*). The defendant pleaded that he was sound, and I allowed him to begin; but I think I was wrong.

(*a*) The case of *Fisher* v. *Joyce*, referred to in the case of *Osborn* v. *Thompson*, ante, p. 337.

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Talfourd, Serjt.—Unsound is an affirmative.

Ludlow, Serjt.—It is in your Lordship's discretion; but if your Lordship decides against me I can have no new trial if the Court should think I ought to have begun.

COLERIDGE, J.—I think you should, if I decided against you, and the Court should think that I was wrong in not letting you begin (*a*). It would be a disadvantage to you, and I think that you ought to have an opportunity of having the point reconsidered.

Ludlow, Serjt.—If a defendant alleges collateral matter in answer to the declaration, I apprehend that the defendant begins; but if the plea is a mere denial of the declaration, whether affirmative or negative, the plaintiff should begin.

COLERIDGE, J.—The rule of the Judges, referred to in the case of *Carter* v. *Jones* (*a*), is not a rule of general application, but only applies to particular actions, of which this is not one.

Ludlow, Serjt.—If, in an action of trespass a right of way is set up, it is a new case; but these pleas are really no more than a denial of the plaintiff's cause of action.

(*a*) In the case of *Huckman* v. *Furnie*, 3 M. & W., 505, Lord *Abinger* and Baron *Alderson* intimated that the Court might grant a new trial, if the Judge at the trial had allowed a party to begin who had not a right to do so; although, in an earlier case (the case of *Burwell* v. *Nicholson*, 1 M. & Rob. 304), the L. C. J. said, that the court doubted, whether, under any circumstances, a new trial ought to be granted on the ground that the Judge at Nisi Prius had come to an incorrect decision as to the right of beginning. "It seemed rather a matter of practice and regulation for the presiding Judge to exercise his discretion upon, than one which the court in banc were to determine as matter of law:" but see the case of *Chapman* v. *Emden*, ante, p. 712.

(*b*) Ante, Vol. 6, p. 64.

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COLERIDGE, J.—I think that the plaintiffs should begin (*a*).

Ludlow, Serjt., opened his case, and stated, that since the granting of the lease, several cottages and other buildings had been erected on the demised premises, in addition to those which were there at the time of the granting of the lease, and that the whole of the buildings and fences were out of repair. He also stated that the gardens had been converted into masons' yards, and that the defendant had allowed footpaths to be made over a part of the demised premises.

To prove the want of repair, Mr. Edward Lucy was called. He said:—"I am an architect and builder; I know the property at the Butts, in the possession of the defendant; on the 25th of February last I surveyed it; the property consists of a large warehouse, and also rooms over the warehouse which are let out for dwellings; the outer walls of the warehouse are in a shattery state; the arches of the windows are tumbling out, and it is, as I think, in a dangerous state; there are four small tenements; they are in a bad state, and want renovating; the roofs want repairing; the fence in front is in a very bad state; some other tenements are at the other end; they are also out of repair; there is some fence that has been attempted to be repaired; I have known the place for forty years; it was a garden then; it is now pigsties, bowling-alleys, cart-sheds, and stone-masons' yards; that is in my judgment not a proper occupation of garden ground; it is a deterioration of the property; my estimate of the repairs is 157*l.* 12*s.*; but I could not undertake to put the premises into repair for that money."

In his cross-examination he said—I recollect the place

(*a*) See the case of *Soward* v. *Leggat*, ante, Vol. 7, p. 613; and *Aston* v. *Perkes*, ante, p. 231, and the notes to that case and the case of *Chapman* v. *Emden*, ante, p. 712.

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in 1806 or 1808; part of it was then garden ground. I consider the property worth less now than it was then. Four of the tenements have been built since 1808, and the four others were made out of the stable. I don't think £500 has been laid out on the place by Mr. Rowlands. My estimate includes the repairing of all the buildings that are there now. The tenements built of Broseley brick, which are furthest from the Severn, were built since the lease; the repairing of them would amount to 30*l.* The building opposite Broadfield was also built since the lease; the repair of that would be about 5*l.* The mason's shop we put a sovereign down for. I put down a sum of 69*l.* for buildings and fences. The want of repair arises not from any sudden cause but from gradual decay and neglect.

On the part of the plaintiff it was proposed to shew, that the defendant allowed foot-paths to be made over the property.

COLERIDGE, J.—How do you make this a breach of these covenants?

Ludlow, Serjt.—I put it as occupying the land in an improper manner. I submit, that if a person rents gardens, it is a breach of a covenant to occupy in a proper manner if he make pigsties and roads there, and allow windows to be opened.

M'Mahon, on the same side.—If a person is to occupy gardens in a proper manner, it must be by occupying them as gardens.

COLERIDGE, J.—I think that the tenant's allowing foot-paths across the property is not a breach of this covenant, because the only way in which it could be so is, that the landlord would be bound by what the tenant did, which he certainly would not be (*a*).

(*a*) See the case of *Wood* v. *Veal*, 5 B. & A. 454.

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Talfourd, Serjt., for the defendant, submitted that the defendant was not liable at all for the non-repair of any building erected since the granting of the lease, and with respect to the original buildings the jury ought to give very small damages; first, because the buildings were very old, and secondly because the lease had several years to run, and whatever damages the jury gave in this action, the plaintiffs would not be bound, and could not be compelled, to lay them out in repairs.

COLERIDGE, J., (in summing up).—In this case there is, for all that appears, a valid subsisting lease of this property, which contains a covenant to repair, which has been to some extent broken; and for that breach of covenant the plaintiffs are entitled to damages, notwithstanding that the lease is in existence and has some years to run. If a lease were granted containing such a covenant as the present, and that lease had 100 years to run, and the covenant was broken in the first year, the landlord would be entitled to some damages for that breach of covenant, though the lease would not expire for 99 years to come; but in estimating the damages in cases where the lease has a long time to run, it is not fair to take the amount that would be necessary to put the premises into repair as the measure of the damages; for in such cases, when the damages are awarded to the landlord, he is not bound to expend them in repairs, neither can he do so without the tenant's permission to enter on the premises. The true question therefore is—to what extent is the reversion injured by the non-repair of the premises? If the lease had ninety-nine years to run, it could not make much difference in the value of the reversion whether the premises were now in repair or not. This lease however will expire in about six years. It appears also that this property originally consisted of a warehouse, a stable, and gardens; and the plaintiffs say that the erection of the present tenements was wrongful; but they (waiving that for the

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present) have sent surveyors who make an estimate amounting to between 150*l.* and 160*l.* The defendant says "I may have done wrong by putting up these tenements, but on the covenants contained in this lease I am only bound well and sufficiently to repair and uphold, and, if need be, to rebuild the warehouse and stable, and to keep the hedges, pales, and other fences in tenantable repair;" and I think that under this covenant the defendant is only bound to keep in repair the buildings which were on the premises at the time of the granting of the lease, and to rebuild them if necessary, and to keep up the fences; and that in estimating the damages you ought not to take into consideration the new cottages that have been built since the granting of the lease. The surveyors have mentioned a sum of £30 for the repair of the Broseley-brick cottages, and also sums of £5 and £1, for repairing some other buildings, all of which must be deducted if these buildings were not in existence at the time of the granting of the lease. The Learned Serjeant (Talfourd) has said that you must make a further deduction on account of the age of the building; but I do not go that length; for as the tenant is not only to repair but to rebuild if necessary, the plaintiffs are entitled to have such parts of the premises, as this covenant relates to, kept always in good repair. The question therefore that you have to determine is—how much the reversion is injured by the breach of this covenant, the covenant being limited to the original buildings and to the fences.

Verdict for the plaintiffs, damages £40.

Ludlow, Serjt., *Curwood* and *M'Mahon*, for the plaintiffs.

Talfourd, Serjt., and *R. V. Richards*, for the defendant.

[Attornies—*Carden* and *Bedford* & *Pidcock*.]

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REGINA *v.* CHARLES THOMAS.

LARCENY.—The prisoner was indicted for stealing a sovereign, the property of Thomas Hins.

A. was treating B. at a beer-house, and A. wishing to pay, put down a sovereign desiring the landlady to give him change; she could not do so, and B. said that he would go out and get change. A. said "You won't come back with the change." B. replied "Never fear." A. allowed B. to take up the sovereign, and B. never returned either with it or the change:—*Held*, no larceny, as A. having permitted the sovereign to be taken away for the purpose of being changed, he could never have expected to receive back the specific coin, and had therefore divested himself of the entire possession of it.

It appeared that the prosecutor and the prisoner, having entered a beer shop, were drinking together, and that the prosecutor who had agreed to treat the prisoner, took a sovereign out of his pocket for the purpose of paying, and offered it to the landlady to change, and upon her declaring her inability to do so she placed it on the table, and the prisoner said, "I'll go and get change." The prosecutor said, "You won't come back with the change," to which the prisoner replied, "Never fear," and taking up the sovereign left the house, and did not again return. It appeared from the evidence of the prosecutor that he was not aware of the last remark of the prisoner, nor, at first, that he had gone out with the sovereign, but he had not offered any opposition to the prisoner's taking it, having left the sovereign on the table after his reply to the prisoner's offer.

Streeten, for the prisoner, submitted, that the intention of the prisoner was clearly to be collected from the evidence, and that as it appeared that the taking was with intent to get change, any subsequent felonious intent of converting it to his own use would not constitute a trespass sufficient to render it a felony; and that the prosecutor having parted with the legal possession of the sovereign, the subsequent appropriation of the money by the prisoner did not amount to larceny.

Huddleston, for the prosecution, submitted, that it did not appear by the evidence that the prosecutor had consented to the taking of the sovereign.

COLERIDGE, J.—I think that the passive conduct of

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the prosecutor amounted to a sufficient sanction of the taking.

Huddleston.—I submit that the prosecutor had not divested himself of the property in the sovereign by even giving it to the prisoner for change, and that it remained his till it was actually changed.

COLERIDGE, (having conferred with GURNEY, B).—It appears quite clear that the prosecutor having permitted the sovereign to be taken away for change, could never have expected to receive back again the specific coin, and he had therefore divested himself, at the time of the taking, of the entire possession in the sovereign, and consequently, I think, that there was not a sufficient trespass to constitute a larceny.

Verdict—Not guilty.

Huddleston for the prosecution.

Streeten for the prisoner.

[Attornies—*Corles* and *Rea.*]

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REGINA *v.* CHARLES THOMAS.

LARCENY.—The prisoner was indicted for stealing a sovereign, the property of Thomas Hins.

A. was treating B. at a beer-house, and A. wishing to pay, put down a sovereign desiring the landlady to give him change; she could not do so, and B. said that he would go out and get change. A. said "You won't come back with the change." B. replied "Never fear." A. allowed B. to take up the sovereign, and B. never returned either with it or the change:—*Held*, no larceny, as A. having permitted the sovereign to be taken away for the purpose of being changed, he could never have expected to receive back the specific coin, and had therefore divested himself of the entire possession of it.

It appeared that the prosecutor and the prisoner, having entered a beer shop, were drinking together, and that the prosecutor who had agreed to treat the prisoner, took a sovereign out of his pocket for the purpose of paying, and offered it to the landlady to change, and upon her declaring her inability to do so she placed it on the table, and the prisoner said, "I'll go and get change." The prosecutor said, "You won't come back with the change," to which the prisoner replied, "Never fear," and taking up the sovereign left the house, and did not again return. It appeared from the evidence of the prosecutor that he was not aware of the last remark of the prisoner, nor, at first, that he had gone out with the sovereign, but he had not offered any opposition to the prisoner's taking it, having left the sovereign on the table after his reply to the prisoner's offer.

Streeten, for the prisoner, submitted, that the intention of the prisoner was clearly to be collected from the evidence, and that as it appeared that the taking was with intent to get change, any subsequent felonious intent of converting it to his own use would not constitute a trespass sufficient to render it a felony; and that the prosecutor having parted with the legal possession of the sovereign, the subsequent appropriation of the money by the prisoner did not amount to larceny.

Huddleston, for the prosecution, submitted, that it did not appear by the evidence that the prosecutor had consented to the taking of the sovereign.

COLERIDGE, J.—I think that the passive conduct of

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roading or air heading, or coals undergone; but that if they left after notice, they were entitled to be paid for that species of work by the owner of the mine, or by the succeeding butty collier. A letter from Mr. Hickman Bond, one of the defendants, was also given in evidence. It was as follows:—

"Sir,—If you will meet here to-morrow morning at nine o'clock, and bring or send the tools, &c., you took from here, by that time you can receive the amount of your valuation.

"I am, Sir, yours, &c.

"Mr. H. Bannister, Tividale, Tuesday, Sept. 10, 1839." "G. H. BOND."

It was opened by *Talfourd*, Serjt., for the defendants, that he should call Mr. Charles Bannister to prove that he had never received any notice; and he should also call several witnesses to shew, that, by the custom, the owner of the mine was never called on to pay for gate roading and air heading, and that if the butty collier left without notice, he was not entitled to be paid for the work by any one; and that if he left after notice he had no claim on the mine owner, but was entitled to receive the amount due for this work from the succeeding butty collier.

For the defendants, Mr. Charles Bannister was called, and he stated that he had never received any notice from Mr. Aston; and with respect to the custom several witnesses were called, who stated that the custom was, that if the working of the mine was stopped, the butty collier was not paid for work of this kind till the working of the mine was recommenced by another butty collier, no matter at what distance of time, but the witnesses could give only a few instances within the last two or three years; and one of them (Mr. Alton), who was a ground bailiff, and whose father and grandfather had been so before him, was aware of only two instances within his own knowledge

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STAFFORD ASSIZES.

(*Civil Side.*)

BEFORE MR. BARON GURNEY.

BANNISTER and Another *v.* BANNISTER and Others.

ASSUMPSIT for work and labour. Plea—non assumpserunt, by all the defendants except George Bannister, and as to him judgment by default.

It was opened by *Ludlow*, Serjt., for the plaintiff, that this action was brought by the plaintiffs, who were butty colliers, against the defendants, as owners of the Tividale Colliery, for the sum of 149*l.* 17*s.* for 125 yards of gate roading, 132 yards of air heading, and about 42 tons of coals undergone. He admitted, that the plaintiffs had been paid for all the coal raised; but he submitted that the custom was, that, when butty colliers left working at a mine, after giving fourteen days' notice, they were entitled to be paid for gate roading, air heading, and coals undergone.

On the part of the plaintiff it was proved that the quantities of gate roading, air heading, and coals undergone were as before stated, and that the prices charged, which were according to a valuation made by Mr. Yardley, a mine surveyor, were fair and reasonable; and it was proved by Mr. John Jones that he was present when Mr. Aston, one of the plaintiffs, gave a written notice to Mr. Charles Bannister, the managing clerk at the mine, that the plaintiffs intended to discontinue the working there.

Several witnesses were called, who stated that the custom was, that when butty colliers left without giving notice they were not entitled to be paid for either gate

The custom is that when butty colliers leave off working a coal mine, without giving notice, they are not entitled to be paid for gate roading, air heading, or coals undergone; but if they leave after having given notice, they are entitled to be paid for these things by the owner of the mine; and if the mine be not worked, they are not bound to wait till the working is recommenced, and to be then paid by the succeeding butty collier.

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matter really stood, as in that note Mr. Bond recognized the valuation.

Verdict for the plaintiffs, damages 149*l.* 17*s.*

Ludlow, Serjt., and *F. V. Lee*, for the plaintiffs.

Talfourd, Serjt., and *R. V. Richards*, for the defendants.

[Attornies—*Holland* and *Collis*.]

(*Crown Side.*)

BEFORE MR. JUSTICE COLERIDGE.

REGINA *v.* GRIFFITHS.

In a case of rape it appeared that the prisoner had been taken before the mayor of N., charged with this offence, and that the prosecutrix was then sworn and her statement taken down by the mayor, who then asked her some further questions, the answers to which were not taken down, and the prisoner was discharged. That which was taken down by the mayor was not read over to the prosecutrix, neither was it signed by her or by the mayor. The prisoner was afterwards committed for trial by other magistrates:—*Held*, that at the trial the prisoner's counsel might cross-examine the prosecutrix as to what she said before the mayor of N. without the production of that which was taken down on that examination.

RAPE.—The prisoner was charged with having ravished Mary Ann Lowe.

It appeared from the cross-examination of the prosecutrix, that she had twice charged the prisoner with the offence; the first time before the magistrates of the borough of Newcastle-under-Lyne, and the second time before the magistrates of the county of Stafford. It further appeared, that the prosecutrix, when before the borough magistrates, was sworn by the mayor, who took down her statement; but that, not being satisfied, he asked some further questions, to which the prosecutrix gave answers which were not taken down; and it was proved that the statement made by her, which was taken down, was not read over to her, or signed either by the magis-

trates or the prosecutrix. After this examination the prisoner was discharged, but he was afterwards again apprehended and taken before the county magistrates, by whom he was committed for trial.

F. V. Lee, for the prisoner, proposed to ask the prosecutrix, without producing that which was taken down by the mayor of Newcastle, whether she had not said certain things on that occasion.

Price, for the prosecution, objected, that whatever was taken down by the mayor of Newcastle must be put in.

F. V. Lee.—I submit that that is not necessary. This was not a deposition. It was not taken in conformity with the act of Parliament. It was not read over to the prosecutrix or signed by her. It was not signed by the magistrate, or even completed; and all that was written must be considered as mere notes or rough minutes taken by the mayor for his own guidance.

COLERIDGE, J., (having conferred with *Gurney*, B.)—We are of opinion that the questions may be put without the paper being produced.

The questions were put.

Verdict—Not guilty.

Price for the prosecution.

F. V. Lee for the prisoner.

[Attornies—*Whalley* and *Hyatt*.]

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REGINA *v.* HALLETT and Six Others.

If in a case of rape the jury are satisfied that non-resistance on the part of the prosecutrix proceeded merely from her being overpowered by actual force, or from her not being able from want of strength to resist any longer, or that from the number of persons attacking her she considered resistance dangerous and absolutely useless, the jury ought to convict the prisoner of the capital charge; but if they think from the whole of the circumstances that, although when the prosecutrix was first laid hold of it was against her will, yet that she did not resist afterwards because she in some degree consented to what was afterwards done to her, they ought to acquit the prisoners of the capital charge, and convict them of an assault only.

RAPE.—The prisoners were indicted for having feloniously ravished Mary Maiden.

It appeared from the evidence of the prosecutrix, that on the night of the 22nd of November she was at a public house at Wolverhampton, at which the prisoners and another person, who was not in custody, were, and that these eight persons followed her to the door of her lodgings, which was fastened on the inside, when the eight persons held her with her back against the door, all of them committing the offence one after the other. The prosecutrix admitted that she had been on the town since the time of the alleged offence, but denied that she had been so before, though she admitted that that was not the first time of her having had intercourse with the other sex.

To confirm the evidence of the prosecutrix a girl, named Elizabeth Roden, was called; she stated that she lodged in the same house as the prosecutrix, which was a brothel, and that, having got up in consequence of hearing a noise on the outside of the house, she and the woman whose house it was, held the door on the inside to prevent its being burst open by the prisoners, who tried to get into the house. This witness also stated, that when the prosecutrix and the prisoners were at the door, she heard the prosecutrix say, "It is too bad for so many to be attacking one poor girl; but if you will go away, and come, one at a time, I will do what I can to satisfy you." This witness gave a different account of the transaction from that which she gave before the magistrates. She stated that she had

A witness at the trial gave evidence which was different from her deposition before the magistrate. The deposition was signed by a mark, which she denied to be hers. Neither the magistrate nor his clerk were at the trial; but a constable proved that he was at the examination, and heard her deposition read over to her, and saw her with a pen in her hand, but did not see her make her mark. He also proved the magistrate's signature, and after reading the deposition (which preceded his own which he had signed) he stated that he believed, that that was the deposition which was read over to the witness:—*Held*, that this deposition might be read to the witness by the officer of the Court for the Judge to examine her upon it.

been twice examined before the magistrates, and that what she said was taken down; and that on each occasion she had made her mark to her deposition after it had been read over to her.

COLERIDGE, J., on the application of *F. V. Lee* for the prosecution, allowed the two depositions of the witness to be shewn to her.

The witness admitted her mark to the first of her depositions, but denied that the mark at the foot of the second was hers.

Neither the magistrate nor his clerk was at the assizes, and a constable named Jones, who was present when Elizabeth Roden was examined before the magistrate on the second occasion, was called, and he was desired to read over the second deposition of Elizabeth Roden, and having done so he said, "This is the signature of the magistrate; I am not sure that I saw Elizabeth Roden make this mark, though I recollect seeing a pen in her hand. I heard her deposition read over to her, and I believe this to be the same that was read over to her, and my own deposition which was signed by me, immediately follows it."

Allen, for the prisoner.—I submit, that the witness cannot be examined from this paper without calling either the magistrate or the magistrate's clerk.

F. V. Lee.—From the cases of *Rex* v. *Hopes* (*a*), and *Rex* v. *Foster* (*b*), it appears that it is not absolutely necessary to call either the magistrate or the magistrate's clerk, even where the statement is that of the accused party, and is to be used as evidence against him. If there is no evidence that this is the mark of the witness, this paper might be proved by any one who heard her make the statement.

(*a*) Ante, Vol. 7, p. 136. (*b*) Id. 148.

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COLERIDGE, J.—The cases referred to are those of statements of prisoners which were evidence of themselves. This is a statement proposed to be put in merely to refresh the memory of the witness.

Allen.—When it is a mark and not a signature, the proper person to prove the correctness of the paper is the person who read it over to the party.

COLERIDGE, J.—Suppose there was no mark at all, why should not a third person say that this was the paper that was read over to the witness?

Allen.—I apprehend that either the person who took it down, or the person who read it over to the witness should be called.

COLERIDGE, J.—The question that I have to decide is, whether this paper may be now read to the witness to examine her upon it. It bears a mark and the signature of the magistrate. The witness denies her mark; but the other witness, Jones, heard her examined, and has proved the magistrate's signature, and having read this paper believes it to have been correctly taken. I think on every principle of common sense it is receivable for the purpose proposed, but I do not inquire if it would be so if it were the statement of a prisoner to be used as substantive evidence against him on his trial.

The two depositions were read to the witness, and she was examined on them by the learned Judge (*a*).

(*a*) In the case of *Rex* v. *Oldroyd*, R. & R. C. C. 88, it was held by the Twelve Judges, that, when a witness upon a trial gives evidence contradictory to facts contained in a deposition made by such witness in a former proceeding, the *Judge* may order such deposition to be read in order to impeach the credit of the witness. "In that case the determination of the Judges was confined to the right of a *Judge* to call for a witness's deposition in order to impeach the cre-

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COLERIDGE, J., (in summing up).—In considering this case as to the capital charge, you will have to say whether this offence was committed against the will of the prosecutrix, and whether she made every resistance that she could; but even if she at last consented to what was done, the prisoners may be found guilty of an assault, as there is no doubt that these persons coming and laying hold of her against the door was an assault; and that so far, at least, it was against her will, as she objected to so many being present at a time. However, it is well worthy of your consideration whether, although she at first objected, she might not afterwards (on finding that the prisoners were determined) have yielded to them, and in some degree consented; and this question is the more deserving of your attention when you come to consider what sort of person she was, what sort of house she lodged in, and that she herself told them that she should make no objection if they came one at a time. If there was non-resistance on her part, but that non-resistance proceeded merely from being overpowered by actual force, or from her not being able from want of strength to resist any longer, or that from the number of the prisoners she considered resistance dangerous and absolutely useless, the full charge is made out, and you ought to convict the prisoners of the capital offence: but if you think under all the circumstances that the prosecutrix, although at first objecting, at all consented to that which was done afterwards, you ought to convict the prisoners of the assault only.

Verdict—Guilty of an assault.

F. V. Lee, for the prosecution.

Allen, for the prisoners.

[Attornies—*Fleetwood & Whalley.*]

dit of a witness who, on the trial, should contradict what she had before deposed; but Lords *Ellenborough* and *Mansfield*, C. J., thought the prosecutor had the same right."

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REGINA *v.* HUGHES.

In a case of rape, if there has been penetration, the jury ought to convict of the capital offence, even though the penetration has not proceeded to the rupture of the hymen.

RAPE.—The prisoner was charged with having feloniously ravished Mary Ann Wesley.

The facts of the case were very clearly proved by the prosecutrix, a girl between eleven and twelve years old, and by a woman who detected the prisoner committing the offence; but with respect to the penetration a surgeon was called, who deposed to the appearances in and about the child's private parts, and stated his belief that penetration had taken place, but that the hymen, which in the prosecutrix was placed at the usual distance from the opening, had not been ruptured.

Allen, for the prisoner, submitted, that as the hymen was entire there could not have been sufficient penetration of the person of the prosecutrix to constitute the capital offence of rape. He cited the cases of *Rex* v. *Gammon* (*a*), and *Rex* v. *M'Rue* (*b*).

COLERIDGE, J., summed up the case to the jury, and desired them to find whether there had been penetration, and whether it had or had not proceeded to the rupture of the hymen.

Verdict—Guilty; the jury finding that there had been penetration, but that the penetration had not proceeded to the rupture of the hymen.

COLERIDGE, J.—I shall reserve this case for the consideration of the Judges.

(*a*) Ante, Vol. 5, p. 321.

(*b*) Ante, Vol. 8, p. 641. See also the case of *Regina* v. *Allen*, ante, p. 31, and the case of *Regina* v. *Jordan*, ante, p. 118.

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M'Mahon, for the prosecution.

Allen, for the prisoner.

[Attornies—*Hunt* and *Whalley*.]

BEFORE LORD DENMAN, C. J., LORD ABINGER, C. B., PARKE, B., ALDERSON, B., PATTESON, J., WILLIAMS, J., COLERIDGE, J., COLTMAN, J., ERSKINE, J., ROLFE, B., AND WIGHTMAN, J.

Price appeared to argue on the part of the prisoner.

COLERIDGE, J.—I reserved this case from respect to my Brother *Gurney*, on account of a dictum of his (*a*). There is an express decision on this point by the twelve Judges (*b*),

(*a*) In the case of *Rex* v. *Gammon*, ante, Vol. 5, p. 321.

(*b*) The case of *Rex* v. *Russen*, 1 Ea. P. C. 438, which is as follows: —"Benjamin Russen was master of a charity school, and was charged with two forcible rapes on Anne Mayne, one of the girls of the said school, the first fact being just before, the other just after she attained her age of ten years. The child swore to a full proof in both respects, [proof of both penetration and emission being at that time essential,] and her testimony was corroborated by marks observed on her linen at the time, but she was deterred by the prisoner's threats from making any discovery till three or four months after the time. For the prisoner it was proved by two surgeons, whose testimony was corroborated by four others who had examined the child, that the passage of the parts was so narrow that a finger could not be introduced, and that the membrane called the hymen which crosses the vagina, and is an indubitable mark of virginity, was perfectly whole and unbroken, so that she never could have been completely known by a man. But as this membrane was admitted to be in some subjects an inch, in others an inch and a half beyond the orifice of the vagina, *Ashurst*, J., who tried the prisoner, left it to the jury to say whether any penetration were proved, for if there were any, however small, the rape was complete in law. The jury found him guilty and he received judgment of death; but before the time of execution the matter being much discussed, the learned Judge reported the case to the other Judges for their opinions, whether his direction were proper; and upon a conference it was unanimously agreed by all assembled, (in the absence of *De Grey*, C. J., and *Eyre*, B.), that the direction of the Judge was perfectly right. They held that in such cases the least degree of penetration is sufficient, though it

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and my Brother *Gurney* says that he does not now hold the same opinion. There is, therefore, nothing in the case.

may not be attended with the deprivation of the marks of virginity. It was therefore properly left to the jury by the Judge, and accordingly the prisoner was executed."

A short-hand report of the evidence in the case of *Rex* v. *Russen*, taken by Mr. Joseph Gurney, is contained in the short-hand writer's notes of the trials at the Old Bailey, in the October Sessions of 1777, p. 360, which will be found in the library of Lincoln's Inn, and also in the city library at Guildhall.

In the case of *Rex* v. *Russen* it is stated, that the membrane called the hymen "is an *indubitable* mark of virginity," and that "in some subjects it was an inch and in others an inch and a half from the orifice of the vagina." The first proposition appears to be much too strongly put, as several cases are mentioned by Dr. Davis, (Elem. of Midw. p. 102), and Dr. Paris, (1 Par. & Fonb. Med. Jur. 203), in which the hymen was entire during the pregnancy of the party, and in one case was obliged to be divided by a surgical operation at the time of the accouchement. With respect to the second proposition there may be some doubt, as in all the preparations in the museum of the Royal College of Surgeons, in which the hymen is shewn, it is not more than a quarter of an inch from the orifice of the vagina.

SHREWSBURY ASSIZES.

(*Crown Side.*)

BEFORE MR. BARON GURNEY.

REGINA *v.* ANN WRIGHT, MARY WRIGHT, and GEORGE WRIGHT.

On a charge of child murder it appeared that the child must have died before it had an independent circulation:—*Held*, that as the child had never had an independent circulation, the charge of murder could not be sustained.

On an indictment for child murder, no one but the mother can be convicted of a concealment of the birth of the child.

MURDER.—The prisoner, Ann Wright, was charged with the murder of her child by suffocating it, and the other prisoners were charged as aiders and abettors.

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F. V. Lee, for the prosecution, in his opening, said, that as the prisoners had no counsel, it was his duty to call the attention of the learned Baron to the evidence of the surgeon, who would state, that, in his judgment, the child must have died before it was fully born, so as to have an independent circulation; and that, if his Lordship agreed with the opinion expressed by Baron *Parke* in the case of *Rex* v. *Enoch* (*a*), it would not be necessary to proceed on the capital part of the charge.

GURNEY, B.—I entirely concur in the opinion of Baron *Parke*, as expressed in the case of *Rex* v. *Enoch*.

Mr. Martin, a surgeon, was called, and he stated, that, in his judgment, the child must have died before it had an independent circulation.

F. V. Lee.—I propose to go into evidence as to the concealment; but I apprehend, that, under the 14th section of the stat. 9 Geo. 4, c. 31, I cannot affect the aiders and abettors with the concealment.

GURNEY, B.—I am of opinion, that, on this indictment, no one can be convicted of the concealment except the mother of the child. (*b*)

The prisoner, Ann Wright, was convicted of the concealment; and the other prisoners acquitted altogether.

F. V. Lee, for the prosecution.

[Attorney—*Fox*.]

(*a*) As to whether a person could be indicted for a misdemeanor in counselling a concealment of the birth of a dead child, see the case of *Rex* v. *Douglas*, ante, Vol. 7, p. 644.

(*b*) Ante, Vol. 5, p. 539.

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HEREFORD ASSIZES.

(*Crown Side.*)

BEFORE MR. JUSTICE COLERIDGE.

REGINA *v.* CHARLES PAGE.

An indictment for uttering counterfeit coin, knowing it to be counterfeit (after a previous conviction), charged that the prisoner did utter a counterfeit half-crown to E. H., "knowing the same to be false and counterfeit:"—*Held*, that the allegation of the scienter was sufficient, and that the word "knowing," must be taken to apply to the prisoner, and not to E. H., who was the last antecedent, and that the scienter must be taken to apply to the time of the uttering, although it was not stated to be "then and there." [3]

FELONY.—The indictment, which was upon sect. 7 of 2 Will. 4, c. 34 (*a*), for a felony, stated, that, at the assizes holden at Hereford, on the 3rd day of August, in the 4 Will. 4, "Charles Page, *together with one Thomas Page*, by the names and descriptions of Charles Page, late of the parish of Bromyard, in the county of Hereford, labourer, and Thomas Page, late of the same, labourer, *was* in due form of law tried and convicted by a certain jury of the country, duly taken and sworn, between our said late Lord the King and the said C. P. and T. P. in that behalf, upon a certain indictment then and there depending against them the said C. P. and T. P.," for uttering one counterfeit shilling, "knowing the same to be false and counterfeit," having in their possession another counterfeit shilling. "And thereupon it was considered by the Court there that the said Charles Page should be imprisoned and kept to hard labour in the House of Correction of Hereford for two years." And that the prisoner having been so convicted, afterwards did utter a counterfeit half-crown to Elizabeth,

An indictment stated, that at the assizes holden at H., on the 3rd of August, 4 Will. 4, "C. P. (the present prisoner), *together with* one T. P., by the name and description of C. P., late of B., in the county of H., labourer, and T. P., late of the same, labourer, *was* in due form of law tried and convicted," by a certain jury duly taken, "between our said late Lord the King and the said C. P. and T. P.," upon an indictment against them for uttering counterfeit coin, they having other counterfeit coin in their possession, "and thereupon it was considered by the Court there that the said C. P. should be imprisoned for two years." The record of the conviction of C. P. stated his conviction, and the acquittal of T. P.:—*Held*, that this was no variance, and that this allegation in the indictment did not import that T. P. was convicted.

(*a*) Set out in Jerv. Arch. 8th Ed. p. 503.

the wife of Thomas Hale, "knowing the same to be false and counterfeit" (*a*). The record of the 4 Will. 4 was

(*a*) The form of the indictment was as follows:—"Herefordshire to wit. The jurors for our Lady the Queen upon their oath present, that heretofore (to wit), at the assizes and general delivery of the gaol of our Lord the late King, holden at Hereford, in and for the county of Hereford, on Saturday, the 3rd day of August, in the 4th year of the reign of our late Sovereign Lord William the Fourth, by the grace of God of the United Kingdom, &c., before the Right Hon. Sir N. C. *Tindal*, Knight, Chief Justice of our said late Lord the King, of his Court of Common Pleas at Westminster; Sir *John Gurney*, Knight, one of the Barons of our late Lord the King, of his Court of Exchequer at Westminster, and others their fellows, justices, &c.; Charles Page, together with one Thomas Page, by the names and descriptions of Charles Page, late of the parish of Bromyard, in the county of Hereford, labourer, and Thomas Page, late of the same, labourer, was in due form of law tried and convicted by a certain jury of the country, duly taken and sworn between our said late Lord the King and the said Charles Page and Thomas Page in that behalf, upon a certain indictment then and there depending against them the said Charles Page and Thomas Page, for that they, the said Charles Page and Thomas Page, on the 14th day of July, in the 4th year of the reign of our late Sovereign Lord William the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, with force and arms, at the parish aforesaid, in the county aforesaid, one piece of false and counterfeit coin, resembling and apparently intended to resemble and pass for a piece of the late King's current silver coin, called a shilling, unlawfully, unjustly, and deceitfully did utter and put off to one Mary Ann Watkins, spinster, knowing the same to be false and counterfeit, and that they, the said Charles Page and Thomas Page, at the time of such uttering and putting off the said piece of false and counterfeit coin as aforesaid (to wit), on the same day and in the year aforesaid, at the parish aforesaid, &c., had in their possession, besides the said piece of false and counterfeit coin so uttered and put off as aforesaid, one other piece of false and counterfeit coin, resembling and apparently intended to resemble and pass for a piece of the late King's current silver coin, called a shilling, knowing the said last-mentioned piece of false and counterfeit coin to be false and counterfeit, in contempt of our said Lord the King and his laws, to the evil example of all others in the like case offending, against the form of the statute &c., and against the peace &c.: And further, that the said Charles Page and Thomas Page, on the 14th day of July, in the 4th year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, one piece of false and counterfeit coin, re-

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put in: it stated the conviction of Charles Page, and the acquittal of Thomas Page; and, (as it was stated at first,) contained the words "then and there," before "knowing the same to be false and counterfeit."

C. Phillips.—1st, There is a variance. The present record omits "then and there," in the writ of the former record. And the present record shews no offence; for, without the words, "then and there" before "knowing," no offence is stated; knowing may mean at any other time than when the uttering took place. 2ndly, There is a variance. The allegation in the present indictment means that both Charles Page and Thomas Page were convicted, whereas the latter was acquitted.

Greaves, and *Skinner*, for the prosecution.—1st, The re-

sembling, and apparently intended to resemble and pass for a piece of the late King's current silver coin, called a shilling, unlawfully, unjustly and deceitfully did utter and put off to the said Mary Ann Watkins, knowing the same to be false and counterfeit, in contempt of our said late Lord the King and his laws, to the evil example &c., against the form &c., and against the peace &c.: And thereupon it was considered by the Court there, that the said Charles Page should be imprisoned and kept to hard labour in the House of Correction for the county of Hereford for two years, as by the record thereof doth more fully appear. And the jurors aforesaid now here sworn and charged to inquire for our said Lady the Queen for the body of the county of Hereford, upon their oath aforesaid, do further present that the said Charles Page, late of the paristh of Ross, in the county of Hereford, labourer, having been so convicted as aforesaid, afterwards (to wit), on the 31st day of December, in the 4th year of our Sovereign Lady Queen Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, with force and arms, at the parish of Ross aforesaid, in the county of Hereford aforesaid, one piece of false and counterfeit coin, resembling, and apparently intending to resemble and pass for a piece of the Queen's current silver coin called a half-crown, unlawfully, unjustly, deceitfully and feloniously did utter and put off to one Elizabeth, the wife of Thomas Hale, knowing the same to be false and counterfeit, in contempt of our said Lady the Queen and her laws, to the evil example &c., against the form of the statute &c., and against the peace &c.

cord produced has not the words "then and there; 2ndly, the offence is sufficiently stated even upon demurrer, without inserting the words "then and there" to the scienter; "knowing" is a participle in the present tense, and therefore imports that the knowledge existed at the time of the uttering. It has been held (*a*), that an indictment, stating that "A. B. *being* an officer," is a sufficient averment that A. B. was an officer at the time: but the record set out was, at all events, good after verdict, as it follows the words of the statute. 3rdly, There is no variance or misdescription of the record. The indictment does not import that both the Pages were convicted, but only that Charles Page was convicted. Charles Page is the nominative to "*was* tried and convicted," and the judgment shews that he alone was convicted. If both had been convicted, the indictment would have alleged that C. P. and T. P. *were* tried and convicted, and would have stated the judgment against both. At all events, if there be a misdescription, it is wholly immaterial. It would have been enough to have alleged that Charles Page was convicted, without introducing Thomas Page's name at all. The introduction, therefore, in a parenthesis, of his name, cannot afford any ground for holding that there is a variance.

COLERIDGE, J.—First, as to the omission of the words "then and there" to the scienter: it is objected, that the indictment does not shew any offence, the objection as to the variance being removed, because the original indictment does not contain the words "then and there." Suppose the omission of those words would have made the original indictment bad on demurrer, yet after verdict it would have been good, being in the words of the statute; and that being so, the prosecutor had to set out a record without those words, and the prosecutor was right in not

(*a*) See the cases of *Rex* v. *Johnson*, 2 Roll. Rep. 226; and *Rex* v. *Somerton*, 7 B. & C. 463.

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setting them out. As to the objection, that the present indictment discloses no offence: I at first thought that there was some weight in the argument, that the knowledge might have been before or after the uttering; but, on the other hand, I am struck with the observation of Mr. *Greaves*, that the participle "knowing," in the present tense, must have reference to the act of uttering; and certainly the words of the statute are the same, and they must be taken to apply to the time of the uttering. The next objection divides itself into two points: the first is, whether there is any conviction and judgment alleged. Now let us try that, by supposing that nothing had been said about Thomas Page, and it is clear that it would have been quite sufficient. But I am to take it with the words respecting Thomas Page; and then the question is, whether this is a variance in point of description. Now, if those words necessarily import that on the former indictment both were convicted, the production of this record would be a variance. Upon that my mind is not free from doubt. It says, that Charles Page, together with Thomas Page, by the names and descriptions of so and so, *was* convicted. I am inclined to think, that it means that Charles Page was tried and convicted. However, I have so much doubt, that I think I ought not to stop the case; but I will reserve the point.

Verdict—Guilty.

Greaves, and *Skinner*, for the prosecution.

C. Phillips, for the prisoners.

[Attornies—*Powell* and ———.]

IN the ensuing term the case was considered by the fifteen Judges, who held the conviction right (*a*).

(*a*) See the case of *Regina* v. *Jones* and *Page*, post, p. 763.

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REGINA *v.* ANN JONES and CHARLES PAGE.

MISDEMEANOR.—The defendants were jointly indicted for uttering a counterfeit half-crown twice on the same day. The indictment charged that the defendants, on the 31st of December, 4 Vict., at &c., "one piece of false and counterfeit coin, resembling, and apparently intended to resemble and pass for a piece of the Queen's current silver coin, called a half-crown, unlawfully, unjustly, and deceitfully did utter and put off to Ann Green, single woman, knowing the same to be false and counterfeit; and that the said Ann Jones and Charles Page afterwards, to wit, on the day of such uttering and putting off *the said piece of false and counterfeit as aforesaid,* in the fourth year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, one other piece of false and counterfeit coin, resembling, and apparently intended to resemble and pass for a piece of the Queen's current silver coin, called a half-crown, unlawfully, unjustly, and deceitfully did utter and put off to one Sarah Ann, the wife of William George, knowing the same to be false and counterfeit." Contra formam statuti et contra pacem.

It was proved, that the defendants were seen together on the morning of the 31st of December, 1840, and that they went about the town of Ross in Company, and that they went together to the George Inn at about half-past two P. M., and that Page went in, leaving Jones in the street, about twelve yards from the door; Page passed a bad half-crown to Ann Green in a room in the George, which was

An indictment for knowingly uttering counterfeit coin, twice on the same day, charged an uttering of a counterfeit half-crown, and that the defendants on the same day "one other piece of false and counterfeit [omitting the word "coin"] resembling, and apparently intended to resemble and pass for, a piece of the Queen's current silver coin, called a half-crown, unlawfully," &c. "did utter and put off to one S. A., the wife of W. G., knowing the same to be false and counterfeit:"—*Held*, that the omission of the word "coin," did not render the indictment bad, as the words "false and counterfeit" might be rejected as surplusage, and the indictment would then be, "one other piece resembling, and apparently intended to resemble and pass for a piece of the Queen's current silver coin, called a half-crown:"—*Held*, also, that the allegation of the scienter was sufficient, and that the word "knowing" must be taken to apply to the prisoner and not to "S. A., the wife of W. G.," who was the last antecedent, and that the scienter must be taken to apply to the time of the uttering, although it was not stated to be "then and there."

On an indictment for a joint uttering of counterfeit coin, where both defendants are not present at the time of the uttering, the true question seems to be, whether the one was so near the other as to help the other to get rid of the counterfeit coin.

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out of the sight of Jones; Page then came out and joined Jones, and they soon afterwards went together to the Sadlers' Arms, into which Jones went and passed another bad half-crown to Sarah Ann George, Page being on the outside of the house about twelve yards from the door, and out of sight from the place where Jones passed the half-crown. Jones was then apprehended, and Page was also apprehended at the place where Jones had left him.

C. Phillips, for the defendants.—I submit that the indictment is bad, first, because the words "then and there" are omitted before the word "knowing;" (*a*) secondly, the word "coin" is omitted after the word "counterfeit;" thirdly, the word "knowing" applies to Ann Green, the last antecedent, and not to the prisoners. Suppose it had been an uttering "to Ann Green, having a black gown on," then the word "having" would clearly have referred to Ann Green.

Greaves.—The first objection I answered in the last case. Secondly, the absence of the word "coin" makes nothing insensible. It is like the case of repeating the Christian name without the sirname, and it has been held, that if a wrong sirname be given in the second instance, it may be rejected and the indictment be good. Lastly, reading the indictment according to common sense, no one can doubt that "knowing" refers to the defendants. In *Rex* v. *Wright* (*b*), it was held that the true rule is so

(*a*) See the preceding case.

(*b*) 3 N. & M. 892. In that case the indictment charged that the defendant, at the township of Wavertree, on a highway *there*, leading from Wavertree towards Childwall to another highway leading from Wavertree towards Little Wootton, by a wall *there* by him erected, had encroached. It was contended, that the word *there* must be taken to refer to the last antecedent, and must be taken to mean Little Wootton; but Lord Chief Justice *Tindal*, in delivering judgment in the Exchequer Chamber, said—"It is contended in argument by the plaintiff in error, that the word 'there' must of necessity be referred to the last antecedent, that is, to Little Wootton. The answer appears to us to be, that the only way

to read an indictment as to make sense of it, and not to put any strained construction on it.

C. Phillips referred to the case of *Kelly* v. *Partington* (*a*).

Greaves.—All that was there decided was, that the words used did not amount to a libel.

COLERIDGE, J., (having conferred with GURNEY, B.)—Three objections have been made. The first is as to the absence of the words "then and there," as to which it has been said that "knowing" might refer to the past or the present. But reading the word "knowing" as a participle in the present tense, I must take it to import the present time. In order to make it mean anything else,

of reading the indictment, so as to make sense of it, is by considering the township of Little Wootton to be stated in the indictment merely as the terminus of one of the cross highways, and in that case there can be no ambiguity in the construction of the indictment, as the word 'there' cannot refer to that highway, but must of necessity refer to the highway in question, namely, that at Wavertree, and we think that if there is no *necessary* ambiguity in the construction of the indictment, we are bound not to create one, by reading the indictment in the only way which will make it unintelligible. In *Ogle's case* (2 H. P. C. 180), the sense is ambiguous. The assault may as well have been made at N. in the county *aforesaid*, as at F. in the county *aforesaid*, of which place the defendant is described by his addition. It is just as sensible whether the reference is made to the one or to the other. There was therefore an uncertainty in that case, which was held to be fatal. But in this case the nuisance by erecting a wall, which is local, must be at Wavertree, where the road is already described to be, it could not possibly be at Wootton. There is therefore no uncertainty, and the word 'there' must consequently be held to refer to the only antecedent which can make sense of the indictment, that is, to Wavertree."

(*a*) 2 N. & M. 460. In that case the declaration stated that the defendant said of the plaintiff "she secreted 1*s*. 6*d*. under the till, *stating these are not times to be robbed;*" and this was held to import that the plaintiff, when secreting the 1*s*. 6*d*., had used the latter words, and that therefore the declaration did not contain that which was actionable per se; and Mr. Justice *J. Parke* said, "We can only construe the words in their grammatical sense."

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something else must be imported, as "before that," or "after that." The second objection is the absence of the word "coin," and as to that I am of opinion that I may reject the words "of false and counterfeit," and then it will stand, that they "afterwards, to wit, on the day of such uttering and putting off *the said* piece as aforesaid," which will be good. The last objection was the one about which alone I had any doubt, and that was the absence of any thing pointing the word "knowing" to the defendants, so that it may be said to refer to Ann Green. There is no obscurity in the statute, and the precedents certainly run "he the said A. B., knowing," and no doubt the indictment would have been better drawn if it had so stated; but still if this indictment read according to common sense is intelligible, that is sufficient. I must take the indictment by itself without the aid of the statute, but I own that I think that any one reading it would understand that the word "knowing" referred to the defendants. All that is said to be done in the indictment is said to be done by the defendants, and therefore "knowing" must be taken to refer to them in the absence of anything else. My brother *Gurney* is entirely of the same opinion. However, I feel considerable difficulty in saying that there is any evidence of a joint uttering by both the defendants. Mr. *Greaves*, how do you say there was a joint uttering?

Greaves.—I say that the uttering of Page, when Jones stood at the door of the George Inn, was the act of Jones as well as Page; and the uttering of Jones, when Page stood at the door of the Sadlers' Arms, was the act of Page as well as of Jones, and I rely on the cases of *Rex* v. *Manners* (*a*), and *Rex* v. *Skerrit* (*b*) and, I ought to add, that it seems that those cases have been considered as though they were felonies; whereas they were misdemeanors, and in mis-

(*a*) Ante, Vol. 7, p. 801. (*b*) Ante, Vol. 2, p. 427.

demeanor every one is a principal, whether present at the fact or not.

COLERIDGE, J.—I think that the case of *Rex* v. *Skerrit* is the nearest to this.

C. Phillips addressed the jury for the defendants.

COLERIDGE, J. (in summing up).—The question here is, whether you are satisfied that, in point of fact, both these prisoners did the act. In order to illustrate the difficulty I feel, suppose Ann Jones in the morning had uttered a bad half-crown, and Charles Page in the afternoon had uttered another, it is clear that Ann Jones would have had nothing to do with what Charles Page did, or Charles Page with what Ann Jones did, and therefore both would be guilty of a single uttering only; but the way in which it is sought to make out that both joined in uttering is this: They say that at the time Ann Jones uttered, Charles Page was so near that the act she did might be considered as his act; but I doubt very much whether the evidence shews that that was so. It seems to me, that the true question is this, whether the one was remaining so near to the other as to help the other to get rid of the counterfeit coin. I own I see considerable difficulty on this evidence in finding both the prisoners guilty, but you may find either guilty.

The Jury found both the defendants guilty.

Greaves, and *Skinner*, for prosecutors.

C. Phillips, for defendants.

[Attornies—*Powell*, and ——— .]

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MONMOUTH ASSIZES.

(*Civil Side.*)

BEFORE MR. JUSTICE COLERIDGE.

JENKINS *v.* PHILLIPS.

In an action for words the declaration stated, that the defendant said of the plaintiff, "He is a thief, a swindler, and a forger," &c. The defendant pleaded not guilty. The words were proved to have been spoken in the Welsh language, but were of the same meaning as the English words stated in the declaration. The Judge at the trial allowed the declaration to be amended under the stat. 3 & 4 Will. 4, c. 42, s 23, by inserting the Welsh words, and directed the trial to be postponed till the next day, on the terms of the plaintiff paying the costs of the day, and making a deposit of £15 with the associate for those costs, subject to taxation; and his Lordship said, that if on the next day the defendant's counsel would give him reason to believe, that the defendant would justify the Welsh words, his Lordship would then put the plaintiff to withdraw the record.

SLANDER.—The declaration stated, that the plaintiff was a Baptist minister, and was retained and employed by the members of a Baptist congregation at Blaenafon, in the county of Monmouth, for great gain, profit, and reward, paid to the plaintiff in that behalf, to preach the Gospel, and that the defendant spoke the following words of the plaintiff:—"He is a thief, a swindler, and a forger, and I have letters in my pocket to prove it. I have the letters at Bristol that he is a forger. He stole wood, the property of Francis James." The declaration also stated, as special damage, that the plaintiff had been "dismissed by the said members from the situation and office of minister to the said Baptist chapel, and had lost all the profits and emoluments which would otherwise have arisen and accrued to him, the plaintiff, as such minister or preacher as aforesaid, by being continued in his said situation, as he might and otherwise would have been."

Plea—Non guilty.

In such a case the amendment ought actually to be made by translating the English words in the declaration into Welsh words of the same meaning, and inserting those Welsh words in the declaration.

In cases of doubt the Judge at the trial will allow amendments under the stat. 3 & 4 Will. 4, c. 42, s, 23, because that section provides a remedy if the Judge allows an amendment which ought not to be made, but gives no remedy in any case in which the Judge has refused to allow an amendment.

On the part of the plaintiff three witnesses were called to prove the speaking of the words, they were all examined in the Welsh language through an interpreter, and they all stated that the words were spoken by the defendant in the Welsh language, but when translated the words proved were to precisely the same effect as those set forth in the declaration.

Ludlow, Serjt., for the defendant.—I submit that this is a fatal variance. The Welsh words should have been set out in the declaration, and also a translation (*a*).

Talfourd, Serjt., for the plaintiff, applied for leave to amend under the 23rd section of the stat. 3 & 4 Will. 4, c. 42 (*b*), by inserting the Welsh words in the declaration.

Whateley, for the defendant.—We, by our plea, only deny speaking the English words.

Talfourd, Serjt.—No one could be misled; whether a person is called a thief, a swindler, and a forger, in one language or another can make no difference.

Ludlow, Serjt.—I recollect a case in which Baron *Gurney*, after conferring with Mr. Justice *Patteson*, would not allow an amendment to be made by inserting additional words in the declaration.

COLERIDGE, J.—That is a very different case.

Ludlow, Serjt.—If we had been conscious of having spoken the words in the Welsh language, we might have suffered judgment to go by default.

(*a*) See the cases of *Zenobio* v. *Axtell*, 6 T. R. 162, and *Cook* v. *Cox*, 3 M. & S. 110; and also as to Welsh words the case of *Slater* v. *Franks*, Hob. 126, and an anonymous case, Ib.

(*b*) Set out ante, Vol. 6, p. 531, n. (*a*).

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Talfourd, Serjt.—In the case of *Guest* v. *Elwes, Esq.* (*a*), which was an action against a sheriff for an escape, in which the defendant pleaded not guilty, and that he did not arrest the party; there was no amendment made at the trial; and the jury found both the issues for the defendant, and also found that the defendant had been guilty of negligence in not arresting the party, and that the plaintiff had sustained damages to the amount of 30*l.*, and the plaintiff had judgment on that finding under the 24th section of the stat. 3 & 4 Will. 4, c. 42.

Ludlow, Serjt.—The case of *Guest* v. *Elwes* will stand as a single case for 500 years.

Whateley.—If your Lordship allows this amendment, it will be an entirely new declaration. The plaintiff in his declaration says, that the defendant spoke certain words; and the defendant denies that he did so. The plaintiff now wishes to say that the defendant spoke other words in another language, but of the same meaning. The defendant might have justified the latter words; and can it be said that this is an amendment "not material to the merits of the case?" The amendments contemplated, no doubt, were either amendments of some matter of form, or a slight inaccuracy of words.

Ludlow, Serjt.—Here is not a mere variance of some of the words, but every word is different.

COLERIDGE, J.—I confess that I do not think that this goes beyond those amendments which the statute authorizes. The statute provides a remedy, if the Judge at the trial allows an amendment which ought not to be permitted; but there is no remedy where the Judge does not allow the amendment, therefore, in cases of doubt, I would allow the amendment to be made.

(*a*) 2 N. & P. 230.

Ludlow, Serjt.—The costs ought to be paid to us, and the record withdrawn, to let the defendant plead de novo.

Whateley.—We must have the words written on the record before we go on.

COLERIDGE, J.—Certainly. The provisions of the act of Parliament are, that where the variance is not material to the merits of the case, and is one by which the opposite party *cannot be prejudiced* in the conduct of his action, prosecution, or defence, the record shall be forthwith amended; but where the variance is in some particular not material to the merits, but such as that the opposite party *may have been prejudiced* in the conduct of his action, prosecution, or defence, the amendment is to be upon payment of costs, withdrawing the record, or postponing the trial, as the Judge shall think reasonable. It is under the latter branch of this provision that I here give the plaintiff leave to amend; it is better to postpone the case till to-morrow, and the plaintiff must pay the costs of the day.

Ludlow, Serjt.—Then we must plead instanter, which is a hardship on the defendant.

COLERIDGE, J.—They are really the same words only in a different language. You cannot be prejudiced. It is not enough for you to tell me that you may justify, but you must convince me that you would do so. Give me the least reason to suppose that you will justify the speaking of these Welsh words, and I will make the plaintiff withdraw the record. I shall allow the amendment, and let the case stand over till to-morrow; and if you, after considering it to-night, will tell me that you will justify, I will put the plaintiff to withdraw the record.

Talfourd, Serjt.—They should also say, that they would

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have justified before, if the declaration had stated the words to have been spoken in the Welsh language.

COLERIDGE, J.—You have no right to insist on that term.

Ludlow, Serjt.—The costs of the day ought to be taxed, and paid immediately.

Mr. C. Bellamy (the Associate).—The costs are taxed in London.

COLERIDGE, J.—The plaintiff should deposit £15 with Mr. Bellamy.

Talfourd, Serjt.—Why should the plaintiff be obliged to make a deposit more than on a postponement for the absence of a witness?

COLERIDGE, J.—It is the price of your being saved from much worse. You must deposit £15, subject to taxation hereafter.

Ludlow, Serjt., stated that his client entirely withdrew any imputation that he had made on the plaintiff; and, by consent,

A Juror was withdrawn.

Talfourd, Serjt., and *Godson*, for the plaintiff.

Ludlow, Serjt., and *Whateley*, for the defendant.

[Attornies—*A. Edwards* and *Baker*.]

See the case of *Foster* v. *Pointer*, ante, p. 718, and the case of *Doe* d. *Bennett* v. *Long*, post, p. 775.

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LLOYD *v.* WALKEY.

In an action for negligence in not properly securing a cow of the defendant in a slaughter-house, the declaration stated, that by means thereof the cow "ran at, butted at, gored, *killed and destroyed*" a cow of the plaintiff. Plea, a payment of 30*s.* into court, and that the pliantiff had sustained no greater damages. Replication, that the plaintiff had sustained greater damages:—*Held*, that the defendant could not go into evidence to shew, that his cow had not killed the plaintiff's cow, as the contrary was admitted by the defendant's plea.

CASE.—The declaration stated that the plaintiff, on &c., "was lawfully possessed, as of his own property, of a certain cow of the value of £20, which was then standing in a certain public slaughter-house for the purpose of being slaughtered and cut up, and sold by the plaintiff in the way of his, the said plaintiff's, trade of a butcher; and the defendant was also then possessed of a certain other cow, which he, the defendant, then brought to and placed in the said slaughter-house, the said cow of the said plaintiff then being in the said slaughter-house as aforesaid; and it then became and was the duty of the defendant to tie up and secure his said cow in the said slaughter-house, so that she might be prevented from injuring the said cow of the plaintiff. Yet the defendant, not regarding his duty in that behalf, did not tie up nor secure his said cow in such a manner as to prevent her from injuring the said plaintiff's said cow, nor in any manner whatever, but then left her at large in the said slaughter-house, and so negligently and improperly conducted himself in that behalf, that, by means of the premises, the said cow of the said defendant there ran at, butted at, gored, *killed and destroyed* the said cow of the plaintiff, and also by means of the premises the said cow of the plaintiff then became of no value to the plaintiff, and wholly lost to the plaintiff, to the damage of the plaintiff of £20." Plea—a payment into Court of 30*s.*, and "that the plaintiff has not sustained damages to a greater amount than the said sum of 30*s.*, *in respect of the causes of action in the declaration mentioned,*" (concluding with a verification). Replication, that the plaintiff "has sustained damages to a greater amount than the said sum of 1*l.* 10*s.* *in respect of the causes of action in the declaration mentioned,*" (concluding to the country).

It was proved, on the part of the plaintiff, that his cow

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was in the slaughter-house properly secured, and that the defendant's cow gored her.

Whateley, for the defendant, proposed to give evidence to shew that the plaintiff's cow was not killed by the defendant's cow, but that the plaintiff's cow, after being hurt by the defendant's cow, was killed by a butcher. He submitted that the payment of money into Court only admitted damages to the amount paid into Court.

COLERIDGE, J.—I think that I ought not to receive evidence that the death of the cow was caused by other means than those stated in the declaration, because I think that the plea admits that the death of the cow was caused in the manner stated in the declaration.

The evidence was rejected.

Verdict for the plaintiff, damages £2 beyond the sum paid into Court.

Ludlow, Serjt. and *W. J. Alexander*, for the plaintiff.

Whateley, for the defendant.

[Attornies—*Mattheus* and *Sherrard*.]

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Doe on the Demise of Bennett *v.* Long and Others.

A. was possessed of lands for more than 20 years, and died in 1817. His widow had possession from that time till her death in 1838. B. was the eldest son of A. and his wife: —*Held*, that though B. could not recover in ejectment as the heir of his father, because more than 20 years had elapsed from the death of his father, yet that the jury might infer that the property belonged to B.'s mother, and survived to her on the death of his father, and descended to B. as her heir on her death in 1838.

B. had concurred, with other members of his family, in letting land to C. as tenant from year to year, and it was agreed that the rent should be paid to D. as agent for the family. B., to whom alone the land really belonged, demanded rent of C., who said, "You are not my landlord." B. then demanded possession, which C. refused to give up:—*Held*, that if the jury were satisfied that the fair meaning of this was, that C. asserted that B. and himself were not in the relation of landlord and tenant, this was a disclaimer; and that C. was not entitled to notice to quit.

If in ejectment the lessor of the plaintiff rely on a disclaimer, it will be no objection to his recovering, that the disclaimer was on the day of the demise laid in the declaration.

Amendments under the 23rd section of the stat. 3 & 4 Will. 4, c. 42, cannot be made after verdict.

EJECTMENT to recover a house and premises, situate in the parishes of Roget and Magor. The day of the demise laid in the declaration was the 27th of October, 1840.

It appeared that the lessor of the plaintiff was the eldest son of both his father and mother, and that the father was in possession of the property more than sixty years ago, and continued in possession till his death, he having died in the house in the year 1817. His widow continued in possession till her death in 1838.

R. V. Richards, for the defendant.—The lessor of the plaintiff claims as the heir of his father, and he has been out of possession more than twenty years since his father's death.

Coleridge, J.—The widow was in possession more than twenty years, and the lessor of the plaintiff is her heir.

R. V. Richards.—If they had not carried it back to the father, it might have been so. The widow had sufficient possession to bar an entry, but no seisin in fee.

Ludlow, Serjt., for the plaintiff.—The widow's possession was originally rightful or wrongful. If she had originally a rightful possession, the property descended to her heir; if her possession was originally wrongful, she got

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a title by her twenty years' possession, which wou descend to her heir.

Whateley, on the same side.—As the widow h possession for more than twenty years, she, under t 3 & 4 Will. 4, c. 27, had a fee.

R. V. Richards.—Whether this statute will or w work injustice, is not for us to consider. The lessor plaintiff claims as heir of his father, and he was ke of possession by his mother; and if the stat. 3 & 4 W c. 27, had never passed, the mother's possession wou have been adverse to the heir, and therefore coul have been a descendible estate.

Coleridge, J.—I will give you leave to move.

It was opened by *R. V. Richards*, for the defe that the defendant Long was tenant to the lessor plaintiff and the other members of his family, and that tenancy had never been determined.

To prove this, Mr. Baldwyn was called. He said— the month of September, 1838, I was present when i agreed by the lessor of the plaintiff and the other bers of his family to let this property to the defe Long for £30 a year, from the 2nd of February, 183 was then stated, that the family of the Bennetts tenants in common, and they asked me to receive rent for them."

In reply, Mr. T. G. Philpotts was called to prove claimer. He said—"On the 27th of October, 1840, companied the lessor of the plaintiff to the defenda read over a description of the property from an abs which I now produce, and the defendant said he w possession of the whole of it. The lessor of the pla said, after me, 'I hereby demand rent from you, not ha ever received any.' The defendant replied, 'You are my landlord.' The lessor of the plaintiff then said

hereby demand possession of the whole of the premises,' repeating the description from the abstract. The defendant refused to give them up."

It was also proved by a clerk of Mr. Philpotts, that when he served the declaration in ejectment on the 30th of October, 1841, the defendant Long said, "James Bennett [the lessor of the plaintiff] is not my landlord."

R. V. Richards objected, that the plaintiff must be nonsuited, as the disclaimer was on the day of the demise laid in the declaration. He cited the case of *Doe* d. *Lewis* v. *Cawdor* (*a*).

COLERIDGE, J.—In the case of *Doe* dem. *Graves* v. *Wells* (*b*), it was held, that a demise in ejectment laid on a day on which the forfeiture of a lease was incurred, to commence from two days previous, was good. I think this is no ground of nonsuit.

Ludlow, Serjt., in reply.—It is not essential to a disclaimer, that the person should claim the property as his own; and if a tenant denies that another person is his landlord, that is a sufficient disclaimer; and if that person

(*a*) 1 C., M., & R. 398. The question in that case was, whether certain letters amounted to a disclaimer; and in that case Baron *Parke*, in delivering judgment, said, "We think that the letters did not amount to a disclaimer; and even if they did, such disclaimer would not be sufficient, because the letters were written *after* the day of the demise; and if they are put as an admission of a previous disclaimer, it is clear that they ought to amount to a recognition of a disclaimer antecedent to the date of the day of the demise."

(*b*) 2 P. & D. 396. In the case of *Roe* d. *Wrangham* v. *Hersey*, 3 Wils. 274, the ejectment was by the heir, who claimed by descent. The ancestor died on the 1st of January. The demise laid in the declaration was on the 1st of January, to hold from previous 31st of December, and it was held good, and the plaintiff succeeded in the ejectment. The case of *Doe* d. *Graves* v. *Wells* also decides, that a denial by parol of a landlord's title does not incur a forfeiture of a lease for years; and Mr. Justice *Patteson* there observes, that "there are many cases where a term from year to year has been forfeited by disclaimer, but those cases turn on the doctrine of waiver."

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be his landlord, he may recover the demised premises by ejectment, without any notice to quit.

COLERIDGE, J. (in summing up).—I think that we should infer that this property belonged to the mother of the lessor of the plaintiff; that it survived to her upon her husband's death, and descended to the lessor of the plaintiff, as her heir, upon her death in the year 1838. Taking that to be so the lessor of the plaintiff would be entitled to the property; but then the defendant in effect says, "I am your tenant, and you cannot recover the property by this ejectment, as there has been no notice to quit." To prove the tenancy Mr. Baldwyn has been called, and his evidence would be a complete answer to the action whatever we may think of the title, unless the lessor of the plaintiff has made out to your satisfaction that the defendant has disclaimed. If you let land to a person from year to year you cannot in general recover back your land without a notice to quit; but if your tenant says, "I deny that you are my landlord—I am not your tenant," he cannot insist upon notice to quit, and you might recover your property from him by an ejectment, although you had given no notice to quit. In the present case it is proved by Mr. Philpotts, that the defendant said to the lessor of the plaintiff, "You are not my landlord." Now, if the defendant had said, that he did not pay the rent to the lessor of the plaintiff, because it was to be paid to Mr. Baldwyn for the whole family, that would have been no disclaimer; and if, on that being said, possession had been demanded, the lessor of the plaintiff would not have been entitled to possession merely because he did not get his rent. However, it is proved in addition to this, that on the 30th of October, when the declaration in ejectment was served, the defendant Long said, "James Bennett is not my landlord." This being after the day of the demise laid in the declaration, would not be important except as evidence to explain what had occurred on the pre-

vious demand of possession; and you will say whether the fair meaning of all this is, that the defendant asserted that the lessor of the plaintiff and himself were not in the relation of landlord and tenant, for, if he did, the lessor of the plaintiff is entitled to recover in this ejectment. But if you think that the defendant meant not to dispute that the lessor of the plaintiff was his landlord, but merely to say that the rent was to be paid to Mr. Baldwyn, that would not be a disclaimer, and the defendant would be entitled to your verdict.

Verdict for the plaintiff.

R. V. Richards asked for leave to move to enter a nonsuit, on the ground that the disclaimer was on the day of the demise.

Whateley applied to amend the declaration under the 23rd section of the stat. 4 & 5 Will. 4, c. 42 (*a*), by altering the day of demise.

R. V. Richards.—I object to any amendment after verdict.

COLERIDGE, J.—I think, on considering the terms of the statute, that it does not apply after verdict. The provisions as to withdrawing the record and postponing the trial, all apply to amendments before verdict. I think that I cannot give leave to amend (*b*); but I shall not give any leave to move to enter a nonsuit.

Ludlow, Serjt., and *Whateley*, for the plaintiff.

R. V. Richards, and *Hanmer*, for the defendant.

[Attornies—*T. G. Philpotts*, and *Baldwyn*.]

(*a*) Set out ante, Vol. 6, p. 531, n. (*a*).

(*b*) See the case of *Jenkins* v. *Phillips*, ante, p. 768.

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GLOUCESTER ASSIZES.

(*Crown Side.*)

BEFORE MR. JUSTICE COLERIDGE.

REGINA *v.* JAMES PORTER, JOHN THOMAS, the Elder, and WILLIAM THOMAS.

A special constable duly appointed under the stat. 1 & 2 Will. 4, c. 41, is appointed for an indefinite time, and remains a constable till his services are either determined or suspended under the 9th section of that statute, and, being so appointed under that statute, he has all the authority of an ordinary constable until his services are either suspended or determined.

MURDER.—The first count of the indictment charged that the prisoners, on the 16th day of August, 1840, at the parish of St. George, in the county of Gloucester, feloniously, &c., did make an assault upon James Nutt Pearce, and that they fractured his scull by striking him on the head with a stone, of which he languished till the 7th of September, and then died at the parish of St. James, in the city of Bristol. The second count was similar, but charged the prisoners John Thomas, the elder, and James Porter, as principals in the first degree, and William Thomas as principal in the second degree. The third count charged John Thomas, the elder, as principal in the first degree, and the other prisoners as principals in the second degree; and stated the death to have been caused by beating. The fourth count charged the prisoner Porter as principal in the first degree, and the other prisoners as principals in the second degree; and stated the death as in the first count (*a*).

It appeared that John Thomas, the younger, was, on the night of the 16th of August, 1840, charged with robbing a garden of a person named Gough, and that he was given into the custody of the deceased, who was engaged by the owners of gardens at St. George's, near Bristol, as a private watchman. It further appeared, that while the deceased was proceeding with John Thomas, the younger,

(*a*) John Thomas, the younger, had originally been included in the indictment, but as to him the bill had been ignored.

to the station-house, the three prisoners attacked him, and that he was struck on the head with a stone; and in order to shew that the deceased was a constable at the time that he took John Thomas, the younger, into custody, the following appointment was given in evidence:—

"Gloucestershire, (to wit). } We, the undersigned, two of his Majesty's Justices of the Peace of the county of Gloucester, acting for the division of Bristol, in the said county, do hereby nominate and appoint James Nutt Pearce to act as a special constable for the parish of Saint George, in the said division, until he receives notice that his service is suspended or determined, according to the tenor of the oath this day taken and subscribed by him. Given under our hands the ninth day of February, 1832.

"H. W. NEWMAN,
"WILLIAM FRIPP.

"Your powers, &c., as a special constable, extend not only for the parish for which you are appointed, but throughout the county of Gloucester."

Godson, for the prisoners.—It is not proved that the deceased was a constable on the 16th day of August, 1840. The appointment put in is dated the ninth day of February, 1832, and is signed by two magistrates. That appointment is founded on the stat. 1 & 2 Will. 4, c. 41, which received the royal assent on the 15th October, 1831. By that statute (after reciting that it was expedient to make other provisions for the better preservation of the public peace), it is enacted by the first section, "that in all cases where it shall be made to appear to any two or more justices of the peace of any county, riding, or division having a separate commission of the peace, or to any two or more justices of the peace of any liberty, franchise, city, or town in England or Wales, upon the oath of any credible witness, that any tumult, riot, or felony has taken place

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or may be reasonably apprehended in any parish, township, or place situate within the division or limits for which the said respective justices usually act, and such justices shall be of opinion that the ordinary officers appointed for preserving the peace are not sufficient for the preservation of the peace, and for the protection of the inhabitants and the security of the property in any such parish, township, or place as aforesaid, then and in every such case such justices, or any two or more justices acting for the same division or limits, are hereby authorized to nominate and appoint, by precept in writing under their hands, so many as they shall think fit of the householders or other persons (not legally exempt from serving the office of constable) residing in such parish, township, or place as aforesaid, or in the neighbourhood thereof, to act as special constables, for such time and in such manner as to the said justices respectively shall seem fit and necessary, for the preservation of the public peace, and for the protection of the inhabitants, and the security of the property in such parish, township, or place;" and the magistrates are empowered to administer an oath to the special constables, the form of which is given by the act. It is manifest from this statute, that the intention of the legislature was that these special constables should be appointed where either a riot or tumult existed or was apprehended, and the provisions of this act could never be intended to apply to a private watchman looking after gardens nine years after; nor could the legislature intend that these special constables should remain constables all their lives.

COLERIDGE, J.—I do not see why not. By the 9th section of this statute it is enacted, "that the justices who shall have appointed any special constables under this act are hereby empowered, or the justices acting for the division or limits within which such special constables shall have been called out, at a special session to be held for

that purpose, or the major part of such last-mentioned justices at such special session, are hereby empowered to suspend or determine the services of any or all of the special constables so called out, as to the said justices respectively shall seem meet; and notice of such suspension or determination of the services of any or all of the said special constables shall be forthwith transmitted by such respective justices to one of his Majesty's principal secretaries of state, and also to the lieutenant of the county."

Godson.—I submit that reference being had to the causes for passing this act, and to the preamble of it, this cannot be considered to be a case within its provisions; and that the deceased, at the time when he received this injury, cannot be considered as acting as a special constable under the stat. 1 & 2 Will. 4, c. 41. It is further to be observed, that the staff which would be given to him as a special constable under that act is not produced.

COLERIDGE, J.—The constable's staff is certainly not essential to his acting.

Godson.—By the 10th section of the act every special constable is, within one week after the expiration of his office, to deliver up his staff, and as his staff is not produced it leads to an inference that his office had expired, and that he had given it up.

W. J. Alexander, on the same side.—It is contended on the part of the prosecution that the deceased was a constable, and to prove that an appointment is put in. Now, the object of that species of appointment was to guard the persons and property of the inhabitants of a place where any riot or tumult existed, or was apprehended, and the regular constables were not sufficient: hundreds and thousands were sworn in as special constables under this statute, and at the time of the riots of 1830 nearly every

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householder was a special constable. If the doctrine contended for on the other side be correct, every one of them is now a constable for all purposes, unless he has been formally dismissed from his office under the 9th section of this statute, and there is no reason to believe that that has ever been done, and if it has not been done all those persons have at this hour not only the authority of constables, but also all the protection of constables.

COLERIDGE, J.—I will not trouble Mr. Greaves, as I have a very clear opinion on this point. By the appointment which has been put in, this person was to serve as a constable, and to continue in that office and act as a special constable until he received notice that his services were suspended or determined according to the tenor of his oath. Now the oath, the form of which is given in the first section of the statute, is this:—"I, A. B., do swear, that I will well and truly serve our Sovereign Lord the King in the office of special constable for the parish [*or* township] of ————, without favour or affection, malice or ill-will; and that I will to the best of my power cause the peace to be kept and preserved, and prevent all offences against the persons and properties of his Majesty's subjects; and that while I continue to hold the said office I will to the best of my skill and knowledge discharge all the duties thereof faithfully according to law. So help me God." From this we may collect the duties of these special constables, and the reason of their appointment, and it is not because the preamble and the object of an act of Parliament do not go so far as the enacting words that they therefore control them. It is not contended by the learned counsel for the prisoners that, to make this a good appointment, it must be shewn that a credible witness was examined before the appointment took place, nor that the deceased took the oath prescribed by the act of Parliament, and it would be highly inconvenient if such proof were required. I take it therefore to be clear that the deceased had a

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good appointment, and then the question arises, whether having had a good appointment it is good several years afterwards. Now by the 9th section of the act of Parliament the magistrates are authorized to suspend or determine the services of these special constables. What is the inference? that unless the magistrates have suspended or determined their services, the appointment is indefinite in point of time, and remains valid and in force till it is either suspended or determined. It is also said, that as no staff is produced the deceased must be taken to have given it up. I do not see that by this act of Parliament it is directed that any staff should be given to these special constables on their appointment (*a*). Seeing that the deceased had a valid appointment under this act of Parliament, which appointment is not shewn to have been determined, and seeing also that by the fifth section of the act it is enacted, "that every special constable appointed under this act shall, not only within the parish, township, or place for which he shall have been appointed, but also throughout the entire jurisdiction of the justices so appointing him, have, exercise, and enjoy all such powers, authorities, advantages, and immunities, and be liable to all such duties and responsibilities, as any constable duly appointed now has within his constablewick by virtue of the common law of this realm, or of any statute or statutes." I think that the deceased was a good common constable, on the 16th of August, 1840, he having been made a special constable under this act of Parliament.

The prisoners were found guilty of Manslaughter.

(*a*) We believe that there is no provision at all in the stat. 1 & 2 Will. 4, c. 41, as to the staves of these special constables, except that which is contained in the 10th section which provides, that every special constable, within a week after the expiration of his office, shall give up "every *staff*, *weapon*, *and other article* which shall have been provided for such special constable under this act."

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Greaves and *Skinner*, for the prosecution.

Godson and *W. J. Alexander*, for the prisoners.

[Attornies—*Day* and *Smallridge*.]

REGINA *v.* RODWAY.

On an indictment for larceny it appeared that a landlord went to his tenant (who had removed all his goods) to demand rent amounting to 12*l.* 10*s.*, taking with him a receipt ready written and signed, the tenant gave him £2, and asked to look at the receipt. It was given to him, and he refused to return it or to pay the remainder of the rent. It was proved by the landlord that at the time he gave the prisoner the receipt, he thought the prisoner was going to pay him the rent; and that he should not have parted with the receipt unless he had been paid all the rent, but that when he put the receipt into the prisoner's hands he never expected to have the receipt again, and that he did not want the receipt again, but wanted his rent to be paid:—*Held*, a larceny, and that the fact of the tenant giving the £2. made no difference.

LARCENY.—The prisoner was indicted for stealing a receipt, which in the first count of the indictment was stated to be "one piece of paper, stamped with a certain stamp denoting the payment of a duty to our said Lady the Queen, of sixpence of the property goods and chattels" of Richard Lambert; 2nd count, for stealing "one piece of paper of the value of one penny (*a*)."

The prosecutor proved that the prisoner rented some premises of him for £25 a-year, and that on the day on which he quitted, there being half-a-year's rent due, he took a stamped receipt ready written and signed to the premises, off which the prisoner had removed all his goods. The prosecutor at the desire of the prisoner went into a room in his house, where the prisoner pulled out a bag of money, and asked the prosecutor whether he had brought a receipt, and the prosecutor said that he had, and the prisoner asked to look at it; the prosecutor gave him the receipt, which the prisoner took, and put two sovereigns into the prosecutor's hand and immediately went away; and upon the prosecutor afterwards asking him for the remainder of the money, he said he had got his receipt and he should not pay it. The prosecutor stated, that at the time he gave the prisoner the receipt he thought the prisoner was going to pay him the rent; that he should not have

(*a*) See the case of *Rex* v. *Bingley*, ante, Vol. 5, p. 602.

parted with the receipt unless he had been paid all the rent; but that when he put it in the prisoner's hands he never expected to have the receipt again, and that he did not want the receipt back again, but wanted his rent to be paid.

Selfe, for the prisoner, submitted that this was not a larceny.

Greaves, for the prosecution, cited *Oliver's case* (*a*), as in point. Here, it was clear, the prosecutor never intended to part with the receipt unless he was paid all the rent. The prisoner, on the contrary, never intended to pay the rent, and obtained the receipt by means of fraud. The property in the receipt, therefore, was not changed, and the case amounted to larceny.

COLERIDGE, J.—I think it is a larceny. The prisoner had removed his goods off the premises, so that the prosecutor could not distrain; and then the prisoner induces the prosecutor to part with the receipt, by asking to look at it, and it is delivered to him for *that* purpose. It is quite clear, also, that the prosecutor never intended to give the prisoner the receipt till he was paid all the rent.

Selfe.—There is £2 paid.

(*a*) Tried at the Northumberland Summer Assizes, 1811, cited 4 Taunt. 274. In that case the prisoner had offered to give the prosecutor gold for bank notes; and upon the prosecutor laying down some bank notes for the purpose of having them changed for gold, the prisoner took them up and went away with them, promising to return immediately with the gold. The prisoner did not return, and the prosecutor never saw him again till he was apprehended. Baron *Wood* "held that the case clearly did amount to larceny, if the jury believed the intention of the prisoner was to run away with the notes and never to return with the gold, whether the prisoner had at the time the animus furandi was the sole point upon which the question turned."

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COLERIDGE, J.—I think that makes no difference.

Verdict—Not guilty.

Greaves, for prosecutor.

Selfe, for prisoner.

[Attornies—*Harmar* and *Browne*.]

REGINA *v.* HEWINS.

On a charge of perjury, alleged to have been committed before commissioners to examine witnesses in a Chancery suit, the indictment stated that the four commissioners were commanded to examine the witnesses. Their commission was put in, and by it the commissioners, *or any three or two of them*, were commanded to examine the witnesses: —*Held*, a fatal variance, and the Judge would not allow it to be amended under the stat. 9 Geo. 4, c. 15.

PERJURY.—The first count of the indictment stated, that a certain cause was depending in the Court of Chancery, in which the Guardians of the Poor of the Evesham Union were plaintiffs, and the Rev. Hugh Smith was defendant, concerning a certain contract and purchase of four cottages at Weston-sub-Edge, "and that such proceedings were thereupon had that afterwards, to wit, at Westminster aforesaid, in the county of Middlesex aforesaid, a certain commission directed to Robert Hiorne Hobbes, William Wilton Woodward, William Kendall, and Oswald Cheek, gentlemen, was issued out of the said Court of Chancery in the said cause, whereby, amongst other things, authority was given to the said Robert Hiorne Hobbes, William Wilton Woodward, William Kendall, and Oswald Cheek, any three or two of them, to examine all witnesses whatsoever upon certain interrogato-

Amendments in criminal cases should be made very sparingly; one objection to amending an indictment being, that it is an alteration of a presentment on the oath of the Grand Jury.

The Judges are unwilling to allow the amendment of variances which might have been avoided by ordinary care.

In an indictment for perjury, charged to have been committed before commissioners to examine witnesses in a Chancery suit, it was alleged that a suit was depending, and that a commission was issued for the examination of witnesses, and that interrogatories were exhibited (the 9th of which was set out; and it was averred that "upon the examination of the said J. H. [the defendant] upon the said interrogatories, it became and was material to ascertain the truth of the matters hereinafter alleged to have been sworn to, and stated by the said J. H. upon his oath, in answer to the said 9th interrogatory."—Whether this is a sufficient averment of materiality—*Quære?*

ries to be exhibited to them the said Robert Hiorne Hobbes, William Wilton Woodward, William Kendall, and Oswald Cheek, as well on the part of the said complainants as on the part of the defendant, or either of them, in the said cause; and whereby also the said Robert Hiorne Hobbes, William Wilton Woodward, William Kendall, and Oswald Cheek, [omitting "or any three or two of them,"] were, amongst other things, commanded to examine each of the said witnesses on their respective corporal oaths first taken before the said Robert Hiorne Hobbes, William Wilton Woodward, William Kendall, and Oswald Cheek, or any three or two of them, the said Robert Hiorne Hobbes, William Wilton Woodward, William Kendall, and Oswald Cheek; and the jurors aforesaid, upon their oaths aforesaid, do further present that in and by the 9th interrogatory exhibited to the said commissioners in the said cause, the said witnesses were interrogated as follows, that is to say," [here the 9th interrogatory was set out]. And that the defendant, one of the witnesses to whom the interrogatories were to be and were administered, came before the said Robert Hiorne Hobbes, William Wilton Woodward, and William Kendall, three of the said commissioners, to be examined as a witness on the part of the said defendant on the said interrogatories, and before them (they "then and there being such commissioners as aforessid, and then and there having sufficient and competent power and authority to administer an oath to the said J. H. in that behalf") was duly sworn. The count then contained the following averment of materiality—"And the jurors aforesaid, upon their oaths aforesaid, do further present that, upon the examination of the said Joseph Hewins upon the said interrogatories, it became and was material to ascertain the truth of the matters hereinafter alleged to have been sworn to and stated by the said Joseph Hewins upon his oath, in answer to the saith 9th interrogatory." The count then stated

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the evidence given by the present defendant (which related to a vestry meeting which had been held at Weston-sub-Edge), and assigned perjury upon it. The 2nd count did not state the commission, but merely stated that Messrs. Hobbes, Woodward, and Kendall were "commissioners duly appointed to take the examination of the said witnesses on the said interrogatories," and that they had power to administer the oath; but in other respects it was nearly similar to the first count. The 3rd count stated the commissioners to be commissioners acting by virtue of a commission for the examination of witnesses issued out of the Court of Chancery, in a cause depending there, and at issue between the guardians of the poor of the Evesham Union and the Rev. Hugh Smith, and averred that they had power to administer an oath. In other respects it was similar to the 2nd count, except that it contained no averment of materiality.

The commission was put in and read. It was directed to the four commissioners, and authorized them, or any three or two of them, to examine all the witnesses of both parties on interrogatories, and commanded them, "*or any three or two of them,*" to examine each of the said witnesses on their respective corporal oaths, first taken before the commissioners, or any three or two of them (*a*).

It appeared that the present defendant had been sworn and examined before three of the commissioners only (Messrs. Hobbes, Woodward, and Kendall).

Godson and *Francillon*, for the defendant.—There is a fatal variance in the setting out of the commission. The mandatory part of the commission contains the words "or any three or two of them," which would empower any two to act. In the setting of this out on the record, those words are omitted.

(*a*) The commission was in the usual form, which will be found in any of the works on the practice of the Court of Chancery.

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COLERIDGE, J.—I think that this variance is fatal to the first count.

Greaves, for the prosecution, asked to be allowed to amend under the stat. 9 Geo. 4, c. 15 (*a*).

Godson.—I submit that this amendment ought not to be allowed. In the case of *Jelf* v. *Oriel* (*b*) it was laid down, that even in a civil case an amendment under this act of Parliament should not be allowed, when there was a variance which would not have occurred if common care had been used; and in the case of *Rex* v. *Cooke* (*c*) Mr. Justice *Patteson* would not allow an indictment to be amended by inserting the time at which a judgment was entered up, instead of an allegation that it was entered up "*in or as of* Trinity Term;" and his Lordship said, that in criminal cases amendments should be made very sparingly.

COLERIDGE, J.—I think that I ought not to allow this amendment. I entirely agree with my Brother *Patteson*, that the discretion of the Judges, as to amending in criminal cases, ought to be exercised very sparingly. One objection to readily permitting an amendment in an indictment is, that by the amendment a presentment on the oath of the Grand Jury is altered. I am also unwilling to amend variances which, by ordinary care in collation, might be avoided.

Godson and *Francillon*, for the defendant, objected that the averment of materiality, in the second count of this indictment, was insufficient, there being no statement of the alleged perjury being material to the Chancery suit, or to any question in that suit, and that there not being in this indictment any averments from which the Court here

(*a*) Commonly called Lord Tenterden's Act.

(*b*) Ante, Vol. 4, p. 22.

(*c*) Ante, Vol. 7, p. 559.

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could judge of the materiality of the alleged perjury, the second count of the present indictment was bad.

COLERIDGE, J.—I have some doubt whether the averment of materiality is sufficient, and I will reserve the point if it should become necessary.

The case proceeded, and the defendant was acquitted on the merits.

Verdict—Not guilty.

Greaves and *Keating*, for the prosecution.

Godson and *Francillon*, for the defendant.

[Attornies—*Griffiths* and *Clark*.]

THE QUARTER SESSIONS occurring during the ASSIZES.

Where the Quarter Sessions of a county occur while the Judge of Assize is proceeding with the trial of prisoners in that county after the grand jury at the assizes have been discharged, the better course is for the Quarter Sessions not to proceed with the trial of any prisoners, but to dispose of all their other business, and then to adjourn to a future day.

THE Quarter Sessions for the county of Gloucester were held on the 6th of April, 1841. The Judge on the Crown Side of the Assizes was still sitting for the trial of the prisoners of that county, but the Grand Jury assembled under the assize process had been discharged. The Court of Quarter Sessions desired the opinion of his Lordship on the following questions:—1st, Whether the Court of Quarter Sessions could proceed to inquire and try prisoners while the Judge of Assize was sitting, the grand jury convened under his process having been discharged; 2nd, Supposing they could not properly proceed to the trial of prisoners, whether they were bound to adjourn; or, whether after having finished such business as came before them of another kind, they might consider the Sessions as completed.

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THE QUARTER SESSIONS.

COLERIDGE, J.—The first question you have put is, whether the Court of Quarter Sessions could proceed to inquire and try prisoners while the Judge of Assize was sitting here, the grand jury convened under his process having been discharged. That question at first seemed to present no difficulty, but certainly upon principle it does not seem to be quite so clear. But looking at the universal practice and the general understanding, and considering what great inconvenience would follow if any doubt should arise, whether the jurors were properly sworn or the prisoners properly tried, I have come very clearly to the practical conclusion, that I should not advise you to try any prisoners, and I express myself in this guarded way as I don't think it perfectly clear (*a*). The second question

(*a*) Before the stat. 25 G. 3, c. 18, it was considered that the authority of the Court of Oyer and Terminer at the Old Bailey was suspended by the sitting of the Court of Queen's Bench in term time; and by that statute, after reciting that 'whereas by the present law of this realm the power and authority of justices appointed and authorized under and by virtue of any commission of Oyer and Terminer, or any commission of gaol delivery, awarded into and for any county or place, are suspended by the coming and sitting of his Majesty's Court of King's Bench, in such county or place; and whereas it has oftentimes happened that the gaol of Newgate, in London, hath not been delivered of all the prisoners in it, nor the business of a session of gaol delivery of the said gaol of Newgate, for the county of Middlesex, finally concluded before the essoign day of term, and the sitting of his said Majesty's Court of King's Bench at Westminster, in the said county of Middlesex, by reason whereof divers prisoners in the said gaol of Newgate have remained untried at such sessions, and have been kept and continued in the said gaol until the following session, to the great inconvenience of the public, to the manifest hindrance and delay of justice, to the prevention of speedy and condign punishment being inflicted on offenders, and to the great increase of the number of prisoners confined in the said gaol, from which the most alarming and dangerous consequences are at times dreaded and likely to ensue,' it is enacted "That when any session of Oyer and Terminer and gaol delivery of the said gaol of Newgate, for the said county of Middlesex, shall have been begun to be holden before the essoign day of any term, that the same session shall and may be continued to be holden, and the business thereof finally concluded, not-

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THE QUARTER SESSIONS.

was, supposing that the Court of Quarter Sessions could not properly proceed to the trial of prisoners, whether they were bound to adjourn, or whether they might, after having finished such business as came before them of another kind, consider the Sessions as completed. If by that question is meant whether the justices would be liable to an information for not proceeding, or whether the Court of Queen's Bench would direct them by mandamus to proceed, or whether the prisoners could complain, I don't think the justices would be bound to proceed; but when we consider that we have statutes as early as the reign of King Edward the Third (*a*), clearly providing for the holding of sessions four times in every year, at a time when the trial of prisoners must have been the principal business of such sessions, and that on a late occasion the very inconvenience now occurring came under the contemplation of the legislature and provisions were made to remedy it (*b*), I own that it seems to me that the magistrates will hardly act under the spirit of those acts, unless they adjourn, but I by no means say that they are bound to do so.

The Sessions adjourned for a week (*c*).

withstanding the happening of such essoign day of any term, or the sitting of his said Majesty's Court of King's Bench at Westminster, or elsewhere, in the said county of Middlesex."

(*a*) The stat. 36 Edw. 3, c. 12.

(*b*) See the stat. 4 & 5 Will. 4, c. 47.

(*c*) See the opinion of Sir Saml. Shepherd and Sir Robert Gifford, in Sir George Chetwynd's Ed. of Burn's Justice, tit. Sessions, I.

NON-PAROCHIAL REGISTERS.

The statute 3 & 4 Vict. c. 92, intituled "An Act for enabling Courts of Justice to admit non-parochial Registers as Evidence of Births or Baptisms, Deaths or Burials, and Marriages," (which received the Royal Assent on the 10th of August, 1840), has made some very important alterations in the law of evidence.

By sect. 1, of that statute, certain non-parochial registers there referred to, are directed to be deposited with the registrar-general in his office; and by section 2 of the same statute, the registration commissioners are authorized, *within twelve calendar months from the passing of this act*, "to inquire into the state, custody, and authenticity of every register or record of birth, baptism, naming, dedication, death, burial, and marriage *which shall be sent to them within three calendar months from the passing of this act;* and, such as they shall find accurate and faithful, they shall certify under the hands and seals of three or more of them (of whom the registrar-general shall not be one), as fit to be placed with the other registers and records hereby directed to be deposited in the said office."

By sect. 3, of the same statute, every place appointed by the registrar-general, with the approval of three commissioners of the treasury, is to be deemed part of his office; and by sect. 6, "all registers and records," deposited by virtue of this act (except the registers of baptisms and marriages at the Fleet and King's Bench prisons, at May Fair, at the Mint, and elsewhere, which were deposited in the registry of the Bishop of London, in the year 1821, by order of the Secretary of State), are to be "deemed in legal custody, and shall be receivable in evidence in all Courts of Justice, subject to the provisions" contained in this act.

Under the 2nd section of this statute, a great number of non-parochial registers have been sent to the registration commissioners and certified by them (*a*).

We have been favoured by Mr. Burn, the secretary to the registration commission, with the following list of the registers that have been made evidence under this statute :—

The Registers of the French Churches	in England,	commencing in the year	1567
——— German Chapels,	do.	do.	1669
——— Dutch Chapel Royal,		do.	1689
——— Swiss Church		do.	1762
——— Presbyterians throughout	England & Wales	do.	1642
——— Independents	do.	do.	1644
——— Baptists	do.	do.	1642
——— Scotch Churches in	England	do.	1758
——— Society of Friends, throughout	England & Wales,	do.	1644
——— Wesleyan Methodists,	do.	do.	1772
——— Methodist's New Connexion,	do.	do.	1787
——— Primitive Methodists,	do.	do.	1813
——— Bible Christians,	do.	do.	1817
——— Inghamites,	do.	do.	1753
——— Moravians	do.	do.	1742
——— Lady Huntingdon's Connexion,	do.	do.	1752
——— Calvinistic Methodists,	do.	do.	1762

(*a*) We believe that about 10,000 register books have been authenticated under this statute, and are deposited in the office of the Registration Commission in Rolls' Yard.

The Registers of the Swedenborgians throughout England & Wales,	commencing	1787
The Registers from Dr. Williams's Library in Redcross-street,	do.	1742
——— the Paternoster Row Registry	do.	1808
The Bunhill Fields' Registers	do.	1713
The Registers of the Liverpool Necropolis	do.	1825
——— Deadman's Place Cemetery, Southwark	do.	1738
——— Leeds Cemetery,	do.	1835
——— Walworth Burial Ground,	do.	1819
——— Ecclesall Cemetery,	do.	1834
——— Norwich Cemetery	do.	1821
——— Roman Catholic Chapels, of about one-third of England (*a*)		———

The 9th and 10th sections of the stat. 3 & 4 Vict. c. 92, provide for the granting of extracts from these registers, to be authenticated by the seal of the registrar-general's office: and by sect. 11 of the same statute, it is enacted, "That in case any party shall intend to use in evidence on the trial of any cause *in any* of the *Courts of Common Law*, or on the *hearing of any matter*, which is *not a criminal case*, at any *session of the peace* in England or Wales, any *extract*, certified as hereinbefore mentioned, from any such register or record, he shall give *notice in writing* to the opposite party, his attorney or agent, of his *intention to use such certified extract in evidence at such trial or hearing;* and at the same time shall *deliver to him*, his attorney or agent, *a copy* of the extract, and of the certificate thereof; and on proof *by affidavit* of the service, or on *admission* of the receipt of such notice and copy, such *certified extract shall be received in evidence*, at such trial or hearing, *if the Judge* or Court *shall be of opinion that such service has been made in sufficient time* before such trial or hearing, *to have enabled the opposite party to inspect the original register* or record from which such certified extract had been taken, or within such time as shall be directed by any rule to be made as hereinafter provided:" and by sect. 12 it is enacted, "That, in case any party shall intend to use in evidence on such trial or hearing *any original register* or record (instead of such certified extract), *he shall, nevertheless, within a reasonable time, give to the opposite party notice of his intention to use such original register* or record in evidence, and *deliver to such opposite party a copy* of a certified extract of the entry or entries which he shall intend to use in evidence." The 13th, 14th, 15th, and 16th sections of the statute contain nearly similar provisions as to Courts of Equity, the Master's Office, and the Ecclesiastical Courts; but by sect. 17 it is enacted, That in all criminal cases the original register or record must be produced.

The registers of the Jews, (which we believe are written in the Hebrew language), remain at the synagogues to which they respectively relate. The registers of baptisms, marriages, and burials in Bengal, at Madras, in Bombay, and at St. Helena, are deposited at the East India House; and the registers of the marriages, births, baptisms, and burials of British subjects beyond seas, which have been transmitted from the different British embassies and factories on the continent of Europe and elsewhere, are deposited in the registry of the Bishop of London, with the exception of the registers of marriages at and near Lisbon, which are deposited in the Vicar General's Office in Doctors' Commons. The registers of the Jews, the East India registers, and the registers of the British embassies and factories, are therefore not at all affected by the stat. 3 & 4 Vict. c. 92.

(*a*) The residue of these registers remain at the Chapels to which they relate.

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TO THE

PRINCIPAL MATTERS.

ABDUCTION.

1. On an indictment for abduction on the stat. 9 Geo. 4, c. 31, s. 19, the jury ought not to convict the prisoner, unless they are satisfied that the prisoner committed the offence from motives of lucre; but evidence of expressions used by the prisoner respecting the property of the lady, such as his stating that he had seen the will of one of her relatives (naming him), and that she would have £220 a-year, are important for the consideration of the jury in coming to a conclusion whether the prisoner was actuated by motives of lucre or not. *Regina* v. *Barratt*, 387

2. If the jury should not be satisfied that the prisoner was actuated by motives of lucre, and they be satisfied that the prisoner used force to the person of the lady in taking her away, and that he took her away against her consent, they may convict him of an assault under the stat. 1 Vict. c. 85, s. 11. *Ibid.*

3. A prisoner was taken into custody at the house of his brother on a charge of abduction. When he was taken, a letter was found in a writing-desk in the room in which he and his brother were. The letter was directed to a person in the neighbourhood of the prisoner's late residence. The police-officer was going to open it, when the prisoner told him it had nothing to do with the business that he had come about:—*Held*, that the letter was receivable in evidence on the trial of the prisoner for the abduction. *Ibid.*

ABORTION.

See ACCESSARY BEFORE THE FACT, 1.

ABUSING FEMALE CHILDREN.

1. Attempting to carnally know and abuse a girl between the ages of ten and twelve, is not an assault, if the girl consents to all that is done, but is a misdemeanor. *Regina* v. *Martin*, 213

2. The person making such an attempt with the consent of the girl is not indictable for an assault, but is indictable for the misdemeanor of attempting to commit the misdemeanor of carnally knowing and abusing her. *Ibid.*

3. An indictment in the first count charged the defendant with having assaulted "E. R., an infant above the age of ten years and under the age of twelve years," with intent to carnally know and abuse her, and in the second count charged that the defendant "unlawfully did put and place the private parts of him the said T. M. against the private parts of her *the*

said E. R., and did thereby then and there unlawfully attempt and endeavour to carnally know and abuse *the said E. R.*:"—*Held*, that the second count was bad, as it did not allege that E. R. was between the ages of ten and twelve:—*Held*, also, that the words "*the said E. R.*," merely meant that she was the same person as was mentioned in the first count, but that those words did not import unto the second count the description of E. R. with respect to her age. *Regina* v. *Martin*, 215

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ACCESSARY AFTER THE FACT.

See RECEIVERS.

To substantiate the charge of harbouring a felon it must be shewn, that the party charged did some act to *assist* the *felon personally*. *Regina* v. *Chapple*, 355

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See SUICIDE.

1. A. was indicted for felony in using an instrument to procure abortion, and B. was indicted with him as an accessary before the fact. A. did not appear to take his trial, but B., who was on bail, appeared:—*Held*, that under these circumstances, B. was not compellable to plead to the indictment, and the Judge allowed B. to be admitted to bail. *Regina* v. *Ashmall*, 236

2. An indictment stated that *a certain evil-disposed person stole* certain goods; that L. C. *incited* him to do so; that E. C. did the same; that E. M. *received* a portion of the property knowing it to have been stolen: it also charged A. A. and the beforementioned E. C. as receivers. All the prisoners having been found guilty by the jury, the conviction was held g against all except L. C., who merely charged as accessary before fact, and judgment was given upon charges of receiving only. *Reg* v. *Casper*, 1

3. Whether a person charged principal in the same indictment wi person charged as accessary, is a c petent witness against the access without being first either acquitted confessing and suffering his puni ment—*Quære*. *Regina* v. *Lyons*, 5

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ACTION, NOTICE OF.

See NOTICE OF ACTION.—POUND-KEEPER, 1, 3.

ADMINISTERING POISON.

See MURDER, 3.

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Where, by a Judge's order, a copy of a letter sent by R. to M., dated December 10, 1830, was ordered to be admitted, it is not enough to put in the notice to admit and the Judge's order, and to put in a copy of a letter from R. to M. of that date; but if a witness also prove that he was at the Judge's chambers when the order was made, and that he produced to the clerk of the opposite attorney the copy of the letter proposed to be given in evidence, that is sufficient. *Clay* v. *Thackrah*, 47

ADVERSE POSSESSION.

See EJECTMENT 3, 7.

AFFIDAVIT.

See CROSS-EXAMINATION, 2.

AFFIDAVIT, TO HOLD TO BAIL IN REVENUE CASES.

See CROSS-EXAMINATION, 1.

AGENT'S COMMISSION.

1. A. acted under a written agreement as the commission agent of B. in the sale of goods, and was paid a commission. B. was a contractor with the Admiralty for the supply of a variety of articles, on the sale of which A. was paid his commission, and A. attended on a number of occasions at Somerset House, where the patterns of these articles were inspected by the government officers. A. sought to charge B. for these attendances in addition to his commission:—*Held*, that if in giving these attendances A. was only acting in the discharge of his business as an agent, he was not entitled to charge for the attendances; but that if these attendances were matter beyond his duty as an agent, he was entitled to be paid for them separately. *Marshall* v. *Parsons*, 656

2. *Held*, also, that this was a question for the jury. *Ibid.*

AGREEMENT.

See LANDLORD AND TENANT, 4.—STAMP, 1.

AMENDMENT.

1. The plaintiff, a journeyman carpenter, sued his master on the custom of the trade by which the master, when the journeyman is sent to work in the country, has to pay the coach fare of the man back to London, and also the back carriage of his tools. It appeared that this custom did not apply where the man, while in the country, was dismissed for misconduct, or dismissed himself. The declaration was founded on a supposed general custom without these exceptions; but the Judge at Nisi Prius allowed the declaration to be amended by inserting these exceptions, and adding averments that the plaintiff was not dismissed for misconduct, and did not dismiss himself, the plaintiff paying the costs occasioned by this amendment. *Read* v. *Dunsmore*, 588

2. In an action for a libel the declaration stated, that the defendant published a libel, "*contained in, and being an article in, a certain weekly printed publication or paper called The Paul Pry.*" At the trial it was proved that the defendant gave a printed slip of paper, which appeared to have been cut from The Paul Pry, to several persons for them to read, and that they

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read it:—*Held*, that the Judge at the trial might properly allow the record to be amended by striking out the above-mentioned allegation that the libel was contained in, and was an article in, The Paul Pry. *Foster* v. *Pointer*, 718

3. In an action for words the declaration stated, that the defendant said of the plaintiff, "He is a thief, a swindler, and a forger," &c. The defendant pleaded not guilty. The words were proved to have been spoken in the Welsh language, but were of the same meaning as the English words stated in the declaration. The Judge at the trial allowed the declaration to be amended under the stat. 3 & 4 Will. 4, c. 42, s. 23, by inserting the Welsh words, and directed the trial to be postponed till the next day, on the terms of the plaintiff paying the costs of the day, and making a deposit of £15 with the associate for those costs, subject to taxation; and his Lordship said, that if on the next day the defendant's counsel would give him reason to believe, that the defendant would justify the Welsh words, his Lordship would then put the plaintiff to withdraw the record. *Jenkins* v. *Phillips*, 766

4. In such a case the amendment ought actually to be made by translating the English words in the declaration into Welsh words of the same meaning, and inserting those Welsh words in the declaration. *Ibid.*

5. In cases of doubt the Judge at the trial will allow amendments under the stat. 3 & 4 Will. 4, c. 42, s. 23; because that section provides a remedy if the Judge allows an amendment which ought not to be made, but gives no remedy in any case in which the Judge has refused to allow an amendment. *Ibid.*

6. Amendments under the 23rd section of the stat. 3 & 4 Will. 4, c. 42, cannot be made after verdict. *Doe* d. *Bennett* v. *Long*, 773

7. On a charge of perjury, alleged to have been committed before commissioners to examine witnesses in a Chancery suit, the indictment stated that the four commissioners were commanded to examine the witnesses. Their commission was put in, and by it the commissioners, *or any three or two of them*, were commanded to examine witnesses:—*Held*, a fatal variance, and the Judge would not allow it to be amended under the stat. 9 Geo. 4, c. 15. *Regina* v. *Hewins*, 786

8. Amendments in criminal cases should be made very sparingly; one objection to amending an indictment being, that it is an alteration of a presentment on the oath of the Grand Jury. *Ibid.*

9. The Judges are unwilling to allow the amendment of variances, which might have been avoided by ordinary care. *Ibid.*

ANIMALS, CRUELTY TO.

See POUND-KEEPER, 4, 5, 6, 7.

APPREHENSION.

See NOTICE OF ACTION.—SPECIAL CONSTABLE.

APPRENTICE.

In an action by the master of an apprentice for an injury done to him per quod servitium amisit, the declaration alleged as special damage, that the apprentice was permanently injured, and could never again be capable of serving the plaintiff as his apprentice during the remainder of the term:—*Held*, that the jury might award damages for the loss of the master up to the end of the term, by reason of the permanent injury of the apprentice, and that they were not limited to give damages for the loss of the master up to the time of the commencement of the action only. *Hodsoll* v. *Stallbrass*, 63

ARMS, LOADED, ATTEMPTING TO DISCHARGE.

See ATTEMPTING TO DISCHARGE LOADED ARMS.

ARSON.

1. In a case of arson it was proved that "the floor near the hearth was scorched. It was charred in a trifling way. It had been at a red heat, but not in a blaze:"—*Held*, that this would be a sufficient burning to support an indictment for arson. *Regina* v. *Parker*, 45

2. A. & B. were charged under the stat. 7 & 8 Geo. 4, c. 30, s. 17, with setting fire to a wood. It appeared that they set fire to a summer-house, which was in the wood, and that from the summer-house the fire was communicated to the wood:—*Held*, that A. & B. might be properly convicted on this indictment. *Regina* v. *Price*, 729

ASSAULT.

See ABUSING FEMALE CHILDREN.—ASSAULTING A GAMEKEEPER.—FIGHTING.—RAPE, 8, 9.

1. Attempting to carnally know and abuse a girl between the ages of ten and twelve, is not an assault, if the girl consents to all that is done, but is a misdemeanor. *Regina* v. *Martin*, 213

2. The person making such an attempt with the consent of the girl is not indictable for an assault, but is indictable for the misdemeanor of attempting to commit the misdemeanor of carnally knowing and abusing her. *Ibid.*

3. An indictment in the first count charged the defendant with having assaulted "E. R., an infant above the age of ten years and under the age of twelve years," with intent to carnally know and abuse her; and in the second count charged that the defendant "unlawfully did put and place the private parts of him the said T. M. against the private parts of her *the said E. R.*, and did thereby then and there unlawfully attempt and endeavour to carnally know and abuse *the said E. R.*" *Regina* v. *Martin*, 215

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5. Every attempt (not every intention, but every attempt) to commit a misdemeanor is a misdemeanor. *Ibid.*

6. If a prisoner be indicted for any felony which includes an assault, he may be convicted of the assault, if the indictment contain any one good count, although all the other counts may be bad. *Regina* v. *Nicholls*, 267

7. If on a trial of an indictment for a rape, it appear that the prisoner was under 14 years of age at the time he committed the offence, he must be acquitted of the rape, but the jury may convict him of an assault under the stat. 1 Vict. c. 85, s. 11. *Regina* v. *Brimilow*, 366

8. On an indictment for abduction on the stat. 9 Geo. 4, c. 31, s. 19, if the jury should not be satisfied that the prisoner was actuated by motives of lucre, and they be satisfied that the prisoner used force to the person of the lady in taking her away, and that he took her away against her consent, they may convict him of an assault under the stat. 1 Vict. c. 85, s. 11. *Regina* v. *Barratt*, 387

9. A. was indicted for assaulting a policeman in the execution of his duty. It appeared that the policeman had gone into a public-house where the defendant was having high words with the landlady. The defendant tried to go into a room in the house in which a guest was, and the policeman, without being desired to do so, collared him, and prevented his going into the room,

and A. struck the policeman, and several blows passed on both sides:—*Held*, that if the jury were satisfied that no breach of the peace was likely to be committed by the defendant on the guest in the room, it was no part of the policeman's duty to prevent the defendant from entering it; but, assuming that to be so, if the defendant used more violence than was necessary to repel the assault committed on him by the policeman, the defendant would be liable to be convicted of a common assault. *Reg.* v. *Mabel*, 474

10. On an indictment for a felony, the jury ought not to convict the prisoner of a completely independent and distinct assault. *Reg.* v. *Guttridge*, 471

11. If a person present a pistol, purporting to be a loaded pistol, at another, and so near as to have been dangerous to life, if the pistol had gone off, *semble*, that this is an assault, even though the pistol is, in fact, not loaded. *Reg.* v. *St. George*, 483

12. On an indictment for a felony, which includes an assault, the prisoner ought not to be convicted of an assault which is quite distinct from the felony charged; and on such an indictment the prisoner ought only to be convicted of an assault which is involved in the felony itself, *Ibid.*

13. A. presented a loaded pistol at B., but was prevented from pulling the trigger:—*Held*, that A. could be properly convicted of this assault, on an indictment for feloniously attempting to discharge loaded arms at B. *Ibid.*

14. In an action for an assault, the declaration stated that the defendant assaulted the plaintiff, "and also then presented a certain pistol loaded with gunpowder, ball, and shot, at the plaintiff, and threatened and offered therewith to shoot the plaintiff, and blow out his brains." To this the defendant pleaded not guilty, and it was proved that the parties being on board a ship, the defendant (who was the captain) went into his cabin and brought out a pistol and cocked it, and presented it at the plaintiff's head, saying, that if the plaintiff was not quiet, he would blow his brains out:—*Held*, that if the defendant, at the time he presented the pistol, used words shewing that it was not his intention to shoot the plaintiff, this would be no assault:—*Held*, also, that it was incumbent on the plaintiff to substantiate the allegation in the declaration, that the pistol was loaded with gunpowder, ball, and shot, and that unless the jury were satisfied that the pistol was loaded, they ought to find for the defendant *Blake* v. *Barnard*, 626

15. On an indictment for attempting to carnally know and abuse a girl under ten years of age, with a count for a common assault. The attempt was proved, but it could not be shewn that the child was under ten years of age, and it also appeared that no violence was used by the prisoner, and no actual resistance made by the girl:—*Held*, that although ***consent*** on the part of the girl would put an end to the charge of assault, yet that there was a great difference between ***consent*** and ***submission***, and that although in the case of an adult submitting quietly to an outrage of this kind would go far to shew consent, yet, that in the case of a child, the jury should consider whether the submission of the child was voluntary on her part, or was the result of fear under the circumstances in which she was placed. *Regina* v. *Day*, 722

ASSAULTING A GAMEKEEPER.

An indictment for assaulting a gamekeeper with a weapon (under the stat. 9 Geo. 4, c. 64, s. 2), stated that the defendants were in certain land of J. R., Earl of B., by night, armed with guns, for the purpose of destroying game, and that they were "then and there in the said land by night as

aforesaid by one W. R., the servant of the said J. R. Earl of B., then and there having lawful authority to seize and apprehend the said [defendants] found," and that the defendants with the guns assaulted and offered violence to W. R.:—*Held*, that the indictment was bad, as it did not sufficiently shew that the defendants, when found by W. R., were committing any offence against the stat. 9 Geo. 4, c. 64. *Reg.* v. *Curnock*, 730

ASSAULTING A POLICEMAN.

See ASSAULT, 7.

ASSIGNMENT.

See BILL OF SALE, 1, 2.—SHERIFF, 1, 2, 3.

ASSUMPSIT.

See PLEADING, 4, 5.

ATTEMPTING TO DISCHARGE LOADED ARMS.

See ASSAULT, 11, 12, 13, 14.

1. If a person intending to shoot another, put his finger on the trigger of a loaded pistol, but is prevented from pulling the trigger, this is not an attempt to discharge loaded arms "by drawing a trigger, *or in any other manner*," within the stat. 1 Vict. c. 85, ss. 3 & 4, as the words "in any other manner" in that statute, mean something analogous to drawing the trigger, which is the proximate cause of the loaded arm going off. *Regina* v. *St. George*, 483

2. The applying a lighted match to a loaded match-lock gun, or the striking the percussion cap of a percussion gun, would be sufficient attempts within these enactments, *Ibid.*

3. An indictment on the 7 Will 4 & 1 Vict. c. 85, ss. 3 & 4, charged the prisoner with *attempting to discharge* at the prosecutor a certain blunderbuss, loaded with gunpowder and divers leaden shots. It appeared that the prisoner, on a refusal by the prosecutor to give him up some title-deeds, addressed him in these words: "Then you are a dead man," and immediately unfolded a great coat which he had on his arm, and took out a blunderbuss, but was not able to raise it to his shoulder, or point it directly at the prosecutor, before he was seized. The blunderbuss was found to be very heavily loaded, but the flint ha dropped out, and was discovered between the lining of the great coat.—*Held*, that the evidence was not sufficient to sustain the charge in the indictment. *Regina* v. *Lewis*, 523

ATTESTATION.

1. The attestation of a deed was in the following form:—"Sealed and delivered by the within-mentioned C. A., in the presence of R. P. C." It was proved by the attesting witness that the signature R. P. C. was of his handwriting, and that he had no recollection of the transaction, but that he should not have signed the attestation if he had not seen the deed executed:—*Held*, sufficient, and that the fact that the attesting witness was neither an attorney nor an attorney's clerk made no difference. *Doe* d. *Counsell* v. *Caperton*, 112

2. It is always extremely injudicious to have a will attested by marks, on account of the difficulty of proving their identity. A will was attested by the signature T. B. V. and the marks of C. and M. D. All these were dead; the signature of Mr. V. was proved, and the daughter of C. and M. D. proved that they were both dead, and that when alive they lived near the testator, no other persons of those names living anywhere in that neighbourhood; and this witness also stated that M. D. could not write, and C. D. could write his name only:—*Held*, sufficient, *Ibid.*

3. Where the attestation of a deed is in the usual form, and the attesting witness recollects seeing the party sign the deed, but does not recollect any other form being gone through, it will be for the jury to say on this evidence, whether the deed was not duly signed, sealed, and delivered, as all that is very likely to have occurred, though the witness did not remember it. *Burling* v. *Paterson*, 570

ATTESTING WITNESS.

See WITNESS, 2, 3.

ATTORNEY.

See COMPANY, 4.—EVIDENCE, 2, 15. —TREASON, 6. 13.

A. accepted a bill for £15, drawn on him by B., which B. indorsed to C., and which was dishonoured. B. owed A. a balance of £102, and several months after, on B. & C. balancing their account, a small balance was found to be in favour of B., which was paid by C. to B., and the bill given back to B. After this M. desired Messrs. E. & W. to bring an action on the bill in the name of C., and gave them the bill and a letter from A. to C. on the subject of it. Messrs. E. & W. commenced an action against A. at the suit of C., and A. paid them the amount of the bill and interest, and also the costs. It was proved by C. that he had never given any authority for the bringing of this action:—*Held*, that A. might recover back the amount of the bill, and interest and costs, from Messrs. E. & W. in an action for money had and received; and that their having acted bonâ fide on the belief that they had the authority of C., and the fact of their having paid over the amount of the bill and interest to M., were no grounds of defence to such an action. *Carman* v. *Edwards*, 596

ATTORNEY, POWER OF.

See EVIDENCE, 2.

AUCTIONEER'S COMMISSION.

The plaintiff was employed to sell ground rents by auction, on the terms of receiving a commission of one per cent. "on sale." After he had advertized the sale, but before the day of sale, the defendant sold the ground rents by private contract. Three auctioneers proved the custom of the trade to be, that after an auctioneer was employed and the property advertised by him, he was entitled to the full commission on a sale being effected, although not through his direct agency. The question left to the jury was, whether this custom was *so notorious*, that the defendant must have known it; and that if so, it was engrafted on the contract. The jury found for the plaintiff for the full commission. *Rainy* v. *Vernon*, 559

AUTREFOIS ACQUIT.

See BURGLARY WITH VIOLENCE.

BAIL.

See ACCESSARY BEFORE THE FACT, 1. —POSTPONING TRIAL.—TRAVERSE.

BAILEE.

See BURGLARY, 1.

BAILMENT.

See GOODS LENT.

1. If A. place a dog with B., and the dog be received by B., to be kept by him for reward, to be paid to him by A., B. is not answerable for the loss of the dog if he took reasonable care of it; but if the dog be lost, the onus lies on B. to acquit himself by shewing that he was not in fault with respect to the loss. *Mackenzie* v. *Cox*, 632

2. Form of plea that the defendant did not receive the goods to be kept for reward. *Ibid.*

BANKERS' CHECK.

See BILL OF EXCHANGE, 3, 4—PLEADINGS (FORMS OF), 3, 4, 5, 6.

BANKRUPT.

1. The protection given by the stat. 2 & 3 Vict. c. 29, s. 1, to contracts with bankrupts, and executions against their property bonâ fide executed or levied before the date and issuing of the fiat of bankruptcy, is not receivable in evidence in an action of trover by the assignee against an execution-creditor, either under the plea of not guilty, or a plea that the plaintiffs were not lawfully possessed of the goods as assignees at the time of the alleged conversion. *Byers, Assignee of Clark,* v. *Southwell,* 320

2. *Semble,* also, that the latter plea does not render it necessary for the plaintiffs to prove the petitioning creditor's debt, *Ibid.*

BEGIN, RIGHT TO.

1. In an action on a bill of exchange by indorsee against acceptor, the defendant pleaded pleas denying the acceptance and the indorsement, and also two pleas of payment, upon all which issue was joined. The defendant's counsel, at the trial, offered to admit the acceptance and indorsement, and wished to begin:—*Held,* that this admission of all the facts, the proof of which was on the plaintiff, did not entitle the defendant to begin. *Pontifex* v. *Jolly,* 202

2. In assumpsit for wrongfully dismissing a teacher in a school before the expiration of the year for which he was engaged, the defendant pleaded only a special plea justifying the dismissal, upon which issue was taken:—*Held,* that on this issue the defendant was entitled to begin. *Harnett* v. *Johnson,* 206

3. In an action of trespass for taking the plaintiff's goods, the defendant pleaded—1st, as to part of the goods, that he took them as a distress for an annuity, payable to M. A.; and, secondly, as to the residue, he justified the taking as a distress for rent due to J. A. Replication to the 1st plea, that the annuity was not in arrear; and to the 2nd, non tenuit:—*Held,* that, on these pleadings, the defendant was entitled to begin. *Aston* v. *Perkes,* 231

4. In an action to recover damages for the non-performance of several contracts, by which the defendants undertook to deliver divers quantities of spelter within certain specified times. The defendant pleaded, 1st, that the plaintiff induced him to enter into the contracts by fraud, covin, and misrepresentation; and, 2nd, that he would have delivered the spelter within the times specified, but was hindered from doing so by the fraud, &c., of the plaintiff:—*Held,* that the defendant had the right to begin. *Steinkeller* v. *Newton,* 313

5. As to the right to begin in those cases which are not within the rule of the Judges as to personal injuries, libel, and slander, but where the affirmative of the issue is on the defendant:—*Held,* that it must be left to the Judge to decide in each particular case, whether the substantial question is the assessment of damages, and if it is, the plaintiff will be entitled to begin. *Hoggett* v. *Exley,* 324

6. In assumpsit on the warranty of a horse, where the plaintiff in his declaration averred that the horse was not sound; and the defendant only pleaded that it was; upon which plea issue was joined:—it was *Held,* that the plaintiff had the right to begin. *Osborn* v. *Thompson,* 337

7. A declaration on a check on a banker, stated that the plaintiff drew his check on W. & Co., and delivered it to B. L., who transferred it to the plaintiff. The defendant pleaded, 1st, that the check was given to B. L. as the nominal value of counters to play at an unlawful game, as B. L. knew, and that before the plaintiff took the check he had notice of the premises;

and 2nd, a similar plea, in which, instead of an averment of notice, it was averred that the plaintiff gave no value for the check. Replication, denying the notice, and stating that the plaintiff gave a good consideration for the check:—*Held*, that on these pleadings the defendant must begin. *Bingham* v. *Stanley*, 374

8. If in assumpsit the defendant plead his discharge under the Insolvent Debtors' Act, and no other plea, and the plaintiff by his replication deny the plea, the defendant must begin. *Lambert* v. *Hale*, 506

9. In assumpsit by the holder against the acceptor of a bill of exchange, the declaration stated that *the drawer indorsed to the plaintiff*. The defendant pleaded that the bill was drawn and accepted for his accommodation, and handed to the drawer that he might get it discounted; that the drawer indorsed it in blank, and delivered it to one A. to get it discounted, who, against good faith, delivered it to the plaintiff for a purpose unknown to the defendant, of all which facts the plaintiff had notice:—*Held*, that on this state of the pleadings the defendant must begin. *Lees* v. *Hoffstadt*, 599

10. In assumpsit by the marshal of the Queen's Bench prison, the declaration stated that in consideration that the plaintiff would allow J. W., a prisoner for debt, to reside within the rules, the defendant promised to indemnify the plaintiff from any escape of J. W. That the plaintiff did allow J. W. to reside in the rules, and that he escaped, and the plaintiff was obliged to pay the amount for which J. W. was imprisoned and other expenses. Plea, that A., the execution creditor and others, conspired to cause another creditor of J. W. to sue out a bailable writ against J. W., and to cause him (if he should go beyond the rules) to be arrested and detained out of the rules till A. could commence an action against the marshal for the escape of J. W., and that in pursuance of that conspiracy a bailable writ was sued out by L., a creditor of J. W., and a warrant granted thereon, upon which J. W. was arrested and detained out of the rules till the marshal was sued for the escape; and that J. W. could and would have returned into the rules before any action could have been commenced against the marshal if he had not been so arrested; and that the plaintiff well knew the premises, and would not plead the same as a defence to A.'s action against him, and would not allow the defendant to defend that action. Replication, admitting the writ and warrant, with de injuriâ as to the residue:—*Held*, that on these pleadings the defendant should begin, notwithstanding that the plaintiff would have to prove the amount of his damages if the defendant failed in proving his plea. *Chapman* v. *Emden*, 712

11. The rule of the Judges as to the right to begin does not extend to actions of covenant; and semble, that it does not extend to any cases of contract, *Ibid.*

12. *Semble*, that the Court above would grant a new trial, if the Judge allowed a party to begin who had not a right to do so, *Ibid.*

13. In an action of covenant the declaration stated, that the defendant covenanted to occupy demised premises in a proper manner, and to keep them in repair. Breaches—that the defendant did not occupy in a proper manner, and did not keep the premises in repair. Plea—that the defendant did occupy in a proper manner, and did keep the premises in repair:—*Held*, that on these issues the plaintiff had the right to begin. *Doe* d. *Trustees of Worcester School* v. *Rowlands*, 734

BIGAMY.

1. In Ireland the marriage of two Roman Catholics by a Roman Catholic priest is good; and if a person at the time of such marriage declares himself

to be a Roman Catholic, and the woman be a Roman Catholic, this is a good marriage as against him; and if he be afterwards tried for bigamy on this marriage, (he having been before married to another wife who was still alive,) he will not be allowed to set up his supposed Protestantism as a defence to the charge. *Regina* v. *Orgill*, 80

2. To prove such a marriage, evidence was given that the Rev. W. O'S. (who officiated) acted as a Roman Catholic priest, and that the marriage (as was usual) took place at his house, and he asked the parties if they were Roman Catholics, and that they said they were so; that part of the ceremony was in English and part in Latin, and that having asked the man if he would take the woman as his wife, and the woman if she would take the man as her husband, and each having answered in the affirmative, he pronounced them married:—*Held*, sufficient, *Ibid.*

3. *Semble*, that the true construction of the 22nd section of the 9 Geo. 4, c. 31, in relation to the offence of bigamy, is this: not that the party, charged to be deprived of the benefit of its provision as a defence, must have known at the time when he contracted the second marriage, that the first wife had been alive during the seven years preceding, but that to bring him within that provision, he must have been ignorant during the whole of those seven years that she was alive. *Regina* v. *Cullen*, 681

BILL OF EXCHANGE AND PROMISSORY NOTE.

See BEGIN, RIGHT TO, 7, 9—EVIDENCE, 6, 7.

1. In an action on a promissory note the defendant pleaded, that the note was given under a parol agreement that the defendant should renew it when due, by paying discount and giving another note, and that he offered to do so; the plaintiff took issue on this plea:—the Judge at the trial, as the plaintiff had taken issue on the plea, would not prevent the defendant from going into evidence in support of this plea, although it was suggested that the plea was bad, as setting up a parol agreement to vary a written instrument. *Holt* v. *Miers*, 191

2. Where a defendant pleaded that a promissory note, on which the plaintiff sued as payee, was given to the plaintiff as trustee for W., and that W. had made a bargain for its renewal on certain terms stated in the plea, and the plaintiff took issue on this plea:—*Held*, that evidence of the actual bargain made by an agent of the defendant with W. might be given in evidence, but that evidence of anything that W. said at any other time was not receivable, *Ibid.*

3. A declaration on a check on a banker, stated that the plaintiff drew his check on W. & Co., and delivered it to B. L., who transferred it to the plaintiff. The defendant pleaded, 1st, that the check was given to B. L. as the nominal value of counters to play at an unlawful game, as B. L. knew, and that before the plaintiff took the check he had notice of the premises; and 2nd, a similar plea, in which, instead of an averment of notice, it was averred that the plaintiff gave no value for the check. Replication, denying the notice, and stating that the plaintiff gave a good consideration for the check:—*Held*, that on these pleadings the defendant must begin. *Bingham* v. *Stanley*, 374

4. For the defendants the plaintiff's attorney was called, who was also the attorney of B. L.:—*Held*, that he might be asked where he last saw B. L., and whether he had ever seen B. L. and the plaintiff together; but that he could not be asked whether he had ever seen this check in B. L.'s possession, *Ibid.*

5. A party being entitled to notice

of dishonour of a bill of exchange on the 28th of April, and all the parties living in town, a witness stated that he put a letter containing the notice of dishonour into the post at one o'clock p. m. on the 28th. The post mark on the letter was the 29th :—*Held*, that if the jury were satisfied that the letter was put into the post sufficiently early for the party in the ordinary course of the post to have received it on the 28th, it was sufficient, and that its having been delayed in the post-office would make no difference. *Stocken* v. *Collins*, 653

6. A notice of dishonour, which states that a bill of exchange "has been dishonoured," is sufficient, although it does not state that the bill has been presented, *Ibid.*

7. A. having been in partnership with B., on the dissolution undertook to collect and pay the partnership debts: A. & B. during the partnership had kept a joint account with a certain Branch Bank; but after the dissolution there was only a single account of A. kept there. A. having greatly overdrawn that account, obtained a promissory note for £500 from B. his former partner, which he indorsed to the bank as a security for his debt, just previous to a quarterly inspection of the accounts of the branch, the clerk who managed the branch promising that it should not be presented. He however kept it, and it was found among the securities of the branch, in his portfolio, when he was discharged from his situation :—*Held*, that the directors of the bank might recover the amount from B. *Bosanquet* v. *Forster*, 659

8. A customer of a branch belonging to the London and Westminster Bank, having overdrawn his account, previous to a quarterly inspection of the affairs of the branch, handed over to the clerk who superintended the business of the branch, and who was his friend, a check for £500, which was entered to the credit of the customer; the clerk promising that it should not be presented, but should be returned after the inspection was over. This check the customer had obtained from an acquaintance, giving him his own check for the same amount in exchange. It was not returned by the clerk to the customer according to his promise, but was found by the directors of the bank among the papers of the branch in the clerk's portfolio, after he had been discharged from his situation :—*Held*, that the directors might recover the amount of the check from the defendant. *Bosanquet* v. *Corser*, 664

9. To assumpsit on a bill of exchange for £150 by the executors of the indorsee against the acceptors, the defendants pleaded, that, on the day when the bill became due, they duly paid and honoured it when presented, according to the tenor and effect of it and of their promise, and then paid the said sum, to wit, £150, the amount made payable by the said bill. It appeared, that, before the bill became due, the indorsee, not having any banker of his own, handed the bill to a friend, in order that he might present it at the bank of Messrs. W. & Co., where it was made payable. This friend indorsed the bill, and got it discounted at the Bank of England; but afterwards receiving an intimation from the party from whom he received it, that it was not to be noted, sent the amount of the bill to the banking-house at which it was payable, on the understanding that he was to have the bill delivered up to him. The acceptors kept cash at that banking-house, and when the bill had been paid, the transaction was entered in their account as if the money to meet the bill had been paid by them; but the bill was delivered up to the party who, in fact, paid in that money. The jury having on this issue found a verdict for the defendants, the Court of Common Pleas set it aside, on the

ground that this payment could not, under the circumstances, be considered as a payment by or on the behalf of the acceptors, but must be taken to have been a payment for the honour of the indorser. *Deacon* v. *Stodhart*, 685

10. The defendants also pleaded that the acceptance was an accommodation acceptance for the drawer, with the knowledge of the indorsee; and that the drawer became insolvent, and the indorsee, the defendants, and two other creditors, agreed among themselves, as his friends, to release their several back debts and liabilities. The plea averred that the defendants and the two other creditors *did discharge and release their several debts, &c.;* and then went on to state that the indorsee, in consideration of the premises, and that certain other creditors would release, abandon, and never enforce payment of their debts, agreed with the defendants that he would never ask for, sue for, demand, or enforce payment of the said bill of exchange. There was then an averment that the other creditors had released their debts. The replication to this plea stated that the indorsee did not agree in manner and form as in the plea mentioned. The evidence was, that the indorsee at first promised to sign the account, if some more signatures were obtained to it; but, after they were obtained, he refused to sign it, but said, on one occasion, that he knew the bill was an accommodation bill, and he should not call on the defendants to pay it; and on another, that the bill should not come against any of the parties, but that he himself would come in as the rest of the creditors. The agreement, signed by the creditors, contained these words: "We, the undersigned, do hereby agree to accept of a release from the said E. A. [the drawer] of the equity of redemption, &c.; and *we agree, upon the execution of such deed, to execute releases*," &c. The indorsee died, and the action on the bill was brought by his executors:—*Held*, that the allegations in the plea were not sustained by the evidence, *Ibid.*

BILL OF SALE.

See SHERIFF, 3.

1. Goods were taken under a fi. fa. as the goods of Sophia W., and on an issue to try whether the goods were the property of the plaintiff, it was proved that the goods, prior to 1836, belonged to Martin W. when they were distrained for rent, and the sum for which they were distrained paid in the name of Sophia W. with the money of the plaintiff. In 1837, Martin W. became bankrupt, and the plaintiff paid £128 to the official assignee for Martin W.'s interest in the goods. Early in 1839 Martin W. took the benefit of the Insolvent Debtors' Act, but his assignee never claimed the goods. In November, 1839, Sophia W. executed an assignment of the goods to the plaintiff, and in March, 1840, the goods were seized under a fi. fa. against Sophia W. The goods always had remained in the possession of Martin W. as the ostensible owner of them, and Sophia W. never was in possession of them:—*Held*, that the plaintiff had made out his property in the goods, and that as Sophia W. had never been in the possession of the goods, and never could have gained false credit by them, there was nothing from which the jury ought to infer that the assignment was fraudulent. *Burling* v. *Paterson*, 570

2. *Held*, also, that the fact, that the assignment was kept at Martin W.'s house was immaterial, and that it was also immaterial that no possession of the goods had been delivered by Sophia W. to the plaintiff, as the right to them would pass by the execution of the deed, *Ibid.*

3. If a person, expecting a fieri fa-

cias will be sued out against him, make an assignment by deed of his goods to trustees for the benefit of his creditors, and the goods be afterwards taken under the fieri facias, and an action of trover for them be brought against the sheriff by the assignees, it will be a question for the jury under all the circumstances, whether the deed was fraudulent or not, that is, whether it was bonâ fide meant to convey the goods to the trustees for the benefit of the creditors generally, or whether it was a pretext only, and the goods were, notwithstanding the deed, really to belong to the assignor, and this is a question of fact, and not a question of law. *Riches* v. *Evans, Esq.* 640

4. The fact that a deed of this kind was executed with intent to avoid a particular execution, does not in point of law make it void, neither will the fact of the assignor remaining in possession, according to the terms of the deed, set it up if the jury think that the deed was a fraud, *Ibid.*

BIRMINGHAM.

See PARISH.

BOARD AND LODGING.

See CONTRACT, 1—CHILDREN, 1. 2.

BRIDGE.

See COMPANY, 7.

BROKER'S COMMISSION.

See AGENT'S COMMISSION — AUCTIONEER'S COMMISSION.

1. *Semble*, that the broker's commission on the freight of a ship is five per cent., unless there be a special agreement or the ship be chartered upon a tender. *Browne* v. *Nairn*, 204

2. The usage is, that when a broker has introduced the captain of a ship and a merchant together, and they by his means enter into some negotiation as to the intended voyage, the broker is entitled to commission if a charterparty be effected between them for that voyage, even though they may employ another broker to prepare the charterparty, or may write the charterparty themselves. *Burnett* v. *Bouch*, 620

3. If a broker be authorized by both parties, and acting as the agent of each, communicates to the merchant what the ship-owner charges, and also communicates to the ship-owner what the merchant will give, and he names the ship and the parties so as to identify the transaction, and a charterparty be ultimately effected for that voyage, this broker is entitled to his commission; but if he does not mention the names so as to identify the transaction, he does not get his commission to the exclusion of another broker, who afterwards introduce the parties personally to each other, *Ibid.*

4. A., a broker, introduced a merchant and a ship-owner together to treat for a charterparty: they finally made the charterparty through B., another broker. In an action by A. for his commission, the particulars of demand were "for commission due to the plaintiff *for procuring a charter* for a vessel called the W.," &c. :—*Held*, sufficient, *Ibid.*

BURGLARY.

See HOUSE AND GOODS OF A CONVICTED FELON—VENUE, 1.

1. A was charged with breaking into the house of K. and stealing the goods of M. It was proved by M. that K., his brother-in-law, had taken the house, and that M. (who lived on his property) carried on the trade of a silversmith for the benefit of K. and his family, having himself neither a share in the profits nor a salary. M. stated that he had authority to sell any

part of the stock, and might take money from the till, but he should tell K. of it, and that he sometimes bought goods for the shop, and sometimes K. did it:—*Held*, that M. was a bailee, and that the goods in the shop might properly be laid as his property. *Regina* v. *Bird*. 44

2. It being proved as to the breaking that the glass of the window had been cut about a month before, but that every portion of the glass remained in its place till the prisoner pushed it in and stole the goods:—*Held*, a sufficient breaking, *Ibid.*

BURGLARY, WITH VIOLENCE.

If a party charged with the crime of murder, committed in the perpetration of a burglary, be generally acquitted on that indictment, he cannot afterwards be convicted of the burglary with violence, as the general acquittal on the charge of murder would be an answer to that part of the indictment containing the allegation of violence. *Regina* v. *Gould*, 364

BURNING.

See ARSON.

BUTTY COLLIERS.

See COLLIERS.

CALLS.

See RAILWAY, 1.

CARPENTER.

1. The plaintiff, a journeyman carpenter, sued his master on the custom of the trade, by which the master, when the journeyman is sent to work in the country, has to pay the coach-fare of the man back to London, and also the back carriage of his tools. It appeared that this custom did not apply where the man, while in the country, was dismissed for misconduct, or dismissed himself. The declaration was founded on a supposed general custom without these exceptions; but the Judge at Nisi Prius allowed the declaration to be amended by inserting these exceptions, and adding averments that the plaintiff was not dismissed for cause, and did not dismiss himself, the plaintiff paying the costs occasioned by this amendment. *Read* v. *Dunsmore*, 588

2. If a master carpenter sends his men from London to work at a gentleman's house in the country, he may dismiss them for improper conduct, although it does not amount to either moral misconduct, wilful disobedience, or habitual neglect; and where, in such a case, a journeyman was found in one of the preserves of the gentleman at whose house the work was done, after a caution had been given to him to keep the paths, and upon complaint by the gentleman, the master dismissed the journeyman, the Judge left it to the jury to say whether the master was not justified in such dismissal. *Ibid.*

3. Forms of declaration and plea. *Ibid.*

CARRIER.

1. In an action against the proprietors of a steam-vessel, to recover compensation for damage done to goods sent by them as carriers, if, on the whole, it be left in doubt what the cause of the injury was, or, if it may as well be attributable to perils of the seas as to negligence, the plaintiff cannot recover; but if the perils of the seas required that more care should be used in the stowing of the goods on board than was bestowed on them, that will be negligence, for which the owners of the vessel will be answerable. *Muddle* v. *Stride*, 380

2. *Whether*, in such a case, on the arrival, and detention by foul weather, of the vessel at a place from which the goods could be conveyed by land to their destination, the captain of the

vessel is bound to give notice to the consignee of the fact, to enable him, if he think proper, to obtain the goods earlier by sending for them—*Quære?* *Ibid.*

CATTLE.

See POUND-KEEPER, 4, 5, 6, 7.

CENTRAL CRIMINAL COURT.

See VENUE, 1.

CERTIFICATE FOR COSTS.

See COSTS—EJECTMENT, 6—LIBEL.

CHALLENGE.

1. The provisions of the stat. 6 Geo. 4, c. 50, s. 29, with respect to challenging jurors by the Crown, is a mere re-enactment of the law on this subject, as it was before the passing of that statute. *Regina* v. *Frost*, 136

2. The challenge of a juror, either by the Crown or by the prisoner, must be before the oath is commenced. The moment the oath is begun it is too late. The oath is begun by the juror taking the book, having been directed by the officer of the Court to do so; but if the juror takes the book without authority, neither party wishing to challenge is to be prejudiced thereby. *Id.* 137

3. On the trial of an action to recover a £500 penalty for bribery, alleged to have been committed at the election of members of Parliament for the borough of L., which was to be tried by a special jury, the attorney on each side had given to the associate a list of names of certain common jurors whom he did not wish to be called. With the omission of those jurors and those who did not appear, there were not sufficient common jurors to make up a full jury when a tales had been prayed:—*Held*, that the case should not stand over, but that all the common jurors should be called over in the usual way, and that no challenge could be allowed except for cause. *Marsh* v. *Coppock*, 480

4. *Held*, also, that it was no cause of challenge that a juror was a tenant of a nobleman whose interest in the borough was supposed to be affected, or that he had been foreman of another jury who had tried another action between other parties for bribery, alleged to have been committed at the same election. *Ibid.*

5. If on the trial of a case of felony the prisoner peremptorily challenge some of the jurors, and the counsel for the prosecution also challenge so many that a full jury cannot be had, the proper course is to call over the whole of the panel in the same order as before, only omitting those who have been peremptorily challenged by the prisoner, and as each juror then appears, for the counsel for the prosecution to state their cause of challenge, and if they had no cause and the prisoner does not challenge, for such a juror to be sworn. *Regina* v. *Geach*, 499

6. It is no cause of challenge of a juror by the counsel for the prosecution in a case of felony, that the juror is a client of the prisoner who is an attorney. *Ibid.*

7. Nor that the juror has visited the prisoner as a friend since he has been in prison. *Ibid.*

8. In a case of felony, after a prisoner has challenged twenty of the jurors peremptorily, he may still examine any other of the jurors (who are subsequently called) as to their qualification. *Ibid.*

CHANCERY (ORDER OF THE COURT OF).

See EVIDENCE, 8.

CHECK.

See BILL OF EXCHANGE, 3, 4, 8—PLEADINGS (FORMS OF), 3, 4, 5, 6.

CHELSEA PENSION.

1. The provisions of the stat. 7 Geo. 4, c. 16, s. 38, extend to the forging and uttering a receipt, or other document, relating to a Chelsea pension, *supposed to be payable;* and are not confined to cases of forging and uttering receipts, and other documents, relating to pensions in actual existence. *Regina* v. *Pringle*, 408

2. An indictment on that statute charged the prisoner with having forged and uttered "a certain receipt, relating to and concerning the payment of a certain pension, to wit, 4*l.* 11*s.* 0½*d.*, *supposed to be payable* to one N. M., as an out-pensioner of the Royal Hospital for Soldiers at Chelsea, in the county of Middlesex:"—*Held*, good. *Ibid.*

CHILDREN.

1. No one is bound to pay another for maintaining his children, either legitimate or illegitimate, except he has entered into some contract to do so. *Seaborne* v. *Maddy*, 497

2. Every man is to maintain his own children as he himself shall think proper, and it requires a contract to enable another person to do so, and charge him for it in an action. *Ibid.*

COIN.

1. An indictment for uttering counterfeit coin, knowing it to be counterfeit (after a previous conviction) charged that the prisoner did utter a counterfeit half-crown to E. H., "knowing the same to be false and counterfeit:"—*Held*, that the allegation of the scienter was sufficient, and that the word "knowing," must be taken to apply to the prisoner, and not to E. H., who was the last antecedent, and that the scienter must be taken to apply to the time of the uttering, although it was not stated to be "then and there." *Regina* v. *Page*, 756

2. An indictment stated, that at the assizes holden at H., on the 3rd of August, 4 Will. 4, "C. P. (the present prisoner), *together with* one T. P., by the name and description of C. P., late of B., in the county of H., labourer, and T. P., late of the same, labourer, *was* in due form of law tried and convicted," by a certain jury duly taken, "between our said late Lord the King and the said C. P. and T. P.," upon an indictment against them for uttering counterfeit coin, they having other counterfeit coin in their possession, "and thereupon it was considered by the Court there that the said C. P. should be imprisoned for two years." The record of the conviction of C. P. stated his conviction, and the acquittal of T. P.:—*Held*, that this was no variance, and that this allegation in the indictment did not import that T. P. was convicted. *Ibid.*

3. Form of indictment for uttering counterfeit coin after a previous conviction. *Ibid.*

4. An indictment for knowingly uttering counterfeit coin, twice on the same day, charged an uttering of a counterfeit half-crown, and that the defendants on the same day "one other piece of false and counterfeit [omitting the word 'coin'] resembling, and apparently intended to resemble and pass for a piece of the Queen's current silver coin, called a half-crown, unlawfully," &c., "did utter and put off to one S. A., the wife of W. G., knowing the same to be false and counterfeit:"—*Held*, that the omission of the word "coin," did not render the indictment bad, as the words "false and counterfeit" might be rejected as surplusage, and the indictment would then be, "one other piece resembling, and apparently intended to resemble and pass for a piece of the Queen's current silver coin, called a half-crown:"—*Held*, also, that the allegation of the scienter was sufficient, and that the word "knowing" must be taken to apply to the prisoner and not to "S.

A., the wife of W. G.," who was the last antecedent, and that the scienter must be taken to apply to the time of the uttering, although it was not stated to be "then and there." *Regina* v. *Jones*, 761

5. On an indictment for a joint uttering of counterfeit coin, where both defendants are not present at the time of the uttering, the true question seems to be, whether the one was so near the other as to help the other to get rid of the counterfeit coin. *Ibid.*

COLLIERS.

The custom is that when butty colliers leave off working a coal mine, without giving notice, they are not entitled to be paid for gate roading, air heading, or coals undergone; but if they leave after having given notice, they are entitled to be paid for these things by the owner of the mine; and if the mine be not worked, they are not bound to wait till the working is recommenced, and to be then paid by the succeeding butty collier. *Bannister* v. *Bannister*, 743

COMMISSION.

See AGENT'S COMMISSION.—AUCTIONEER'S COMMISSION.—BROKER'S COMMISSION.

COMPANY.

1. By the Cheltenham and Great Western Union Railway Act, 6 Will. 4, c. lxxvii, it is enacted, that in an action for calls on shares in that Company, the book of shares, under the seal of the Company, shall be primâ facie evidence that a party is proprietor of shares. It appeared that a call was made in October, 1836, and that the book of shares, which contained the name of the defendant as a shareholder, was made up before the end of September, 1836, from claims sent in by different parties, but that the seal was not affixed to it till November, 1836:—*Held*, that this book was no evidence that the defendant was a proprietor of shares at the time of the call in October, 1836. *The Cheltenham Union Railway Co.* v. *Price*, 55

2. Form of declaration, *Ibid.*

3. Form of plea that the defendant was not a proprietor, *Ibid.*

4. In an action by the solicitor of an intended company for preparing their co-partnership deed, a person may be liable without being one of the directors. The persons who are directors are liable, and other persons may be liable also, if they interfere in the management, and hold themselves out as persons giving the order; and in such a case the question will be, whether such persons as were not directors so acted as to become employers of the solicitor in preparing the deed. *Bell* v. *Francis*, 66

5. Where a local committee is formed for the purpose of forwarding the project of an intended railway, they are the persons who are liable to pay the salaries of their secretary, &c., unless it be shewn that the secretary, &c., agreed to look to some other fund for payment. *Kerridge* v. *Hesse*, 200

6. And where the defendant was not a member of the local committee at the time the plaintiff was first engaged as secretary, but became so while the plaintiff continued secretary, it will be for the jury to say whether the defendant did not continue to employ the plaintiff on the same terms on which he was originally engaged. *Ibid.*

7. A corporation aggregate, or a railway company, are liable to be indicted for breaches of duty, such as the non-repair of bridges, which it is their duty to repair. If they are indicted in Q. B., they can appear by attorney, but if they are indicted at the assizes, *semble*, that they cannot appear there by attorney, but should apply for a writ of certiorari, and appear by attorney in Q. B.; and if they do not, there may be a distress ad infinitum against them. *Regina* v. *The Birmingham and Gloucester Railway Co.* 469

COMPOUNDING FELONY.

See FOREGOING A PROSECUTION.

CONCEALMENT OF BIRTH.

On an indictment for child murder, no one but the mother can be convicted of the concealment of the birth of the child. *Regina* v. *Wright*, 754

CONFESSION.

See DEPOSITION, 3.

1. On the trial of the indictment for the rape, it was proposed to put in the depositions of each of the prisoners taken on oath at the inquest held on the party alleged to have been ravished. It appeared that each of the prisoners was in custody at the inquest; that no inducement to confess was held out, and that each was asked if he wished to make a statement, and said that he did. The Judge received the statements in evidence, but said he would reserve the point if it should become necessary. *Regina* v. *Owen*, 83

2. Where anything is found in consequence of a statement made by a prisoner under circumstances which preclude its being given generally in evidence, such part of it as relates to the thing found in consequence is receivable, and ought to be proved. *Regina* v. *Gould*, 364

CONSPIRACY.

See TREASON, 15—UNLAWFUL ASSEMBLY.

1. On the trial of an indictment for a conspiracy to procure large numbers of persons to assemble, for the purpose of exciting terror in the minds of her Majesty's subjects, evidence was given of several meetings at which the defendants were present, and it was proposed to ask a witness, who was a superintendant of police, whether persons complained to him of being alarmed by these meetings:—*Held*, that the evidence was receivable, and that it was not necessary to call the persons who made the complaints. *Regina* v. *Vincent*, 275

2. A. was charged with having conspired with W. J. and others unknown, to raise insurrection and obstruct the laws. It was proved that A. and W. J. were members of a Chartist lodge, and that A. and W. J. were at the house of the latter on a certain day, on the evening of which A. directed people assembled at the house of W. J. to go to the race-course at P., whither W. J. and other persons had gone:—*Held*, that on the trial of A., evidence was receivable that W. J. had, at an earlier part of the same day, directed other persons to go to the race-course; and it being proved that W. J. and an armed party of the persons assembled went from the race-course to the New Inn, it was held, that evidence might be given of what W. J. said at the New Inn, it being all one transaction. *Regina* v. *Shellard*, 277

CONSTABLE.

See SPECIAL CONSTABLE.

CONTRACT.

See CHILDREN.

1. A. and his wife boarded and lodged in the house of B. the brother of A., and both A. and his wife assisted B. in carrying on his business. A. brought an action for the services, to which B. pleaded a set-off for board and lodging:—*Held*, that neither the services on the one hand, nor the board and lodging on the other, could be charged for unless the jury were satisfied that the parties came together on the terms that they were to pay and to be paid; but, that if that were not so, no ex post facto charge could be made on either side. *Davies* v. *Davies*, 87

2. A. sued B., C., and D. in a *joint* action for an attorney's bill. B. pleaded nunquam indebitatus, and C. and D.

suffered judgment by default:—*Held*, that in order to entitle A. to a verdict against B. the jury must be satisfied that there was a *joint* contract with A. by B., C., and D., *jointly*, and that it was not sufficient to shew that there was a *separate* contract between A. and B. only, even though the evidence would have been sufficient to have supported an action by A. against B. alone. *Robeson* v. *Ganderton*, 476

CONVICTION.

See PREVIOUS CONVICTION.

1. Magistrates having convicted a party under the Highway Act, they drew up a conviction and returned it to the clerk of the peace, and on an action being brought against them, they put in the conviction returned to the clerk of the peace, (which was open to some formal objections), and also another conviction drawn up afterwards in a more formal shape:—*Semble*, that there is no impropriety in this course of proceeding, provided the latter conviction is according to the truth and supported by the facts of the case. *Selwood* v. *Mount, Esq.* 75

2. *Semble*, that, on deciding a case, magistrates ought not to take an indemnity, as it has the effect of enabling them to decide more safely in favour of a party who is able to give an indemnity, than of one who cannot do so. *Ibid.*

COPARTNERS.

See COMPANY.

CORONER.

See MANSLAUGHTER, 4, 5.

CORONER'S INQUISITION.

See MANSLAUGHTER, 6.

CORPORATION.

See COMPANY.

1. Primâ facie, it must be presumed that the books of a corporation, which existed before the Municipal Reform Act, are in the possession of the new corporation which succeeded them under that act; but if it be shewn that the old corporation, before their dissolution, deposited them with a banker, and that from his hands they passed into the Master's office of the Court of Chancery, this rebuts the presumption. *Corporation of Ludlow* v. *Charlton, Esq.* 242

2. In an action brought by the new corporation, it appeared that the defendant had presented a petition to the Vice-Chancellor to allow the production of these books on the present trial, which petition was opposed by the present plaintiffs, and dismissed with costs:—*Held*, that under these circumstances the defendant was entitled to give parol evidence of the contents of the books. *Ibid.*

3. A corporation came to a vote that if C. would alter the site of a house, the corporation would pay him £500. —This resolution was entered in the corporation book, and C. altered the site of the house:—*Held*, that the resolution was not valid, as it was not under the corporate seal. *Ibid.*

4. An old corporation, before the Municipal Reform Act, were trustees of a charity, and a tenant of the charity had paid rent to the secretary to the old corporation up to Lady-day, 1836: —*Held*, that this was a good payment, and might be taken advantage of in an action brought by the new corporation for the rent, *Ibid.*

COSTS.

See HIGHWAY, 1, 2, 3—DISOBEDIENCE OF ORDER FOR COSTS—EJECTMENT, 6—LIBEL, 10.

Certificate as to costs of several pleas under the stat. 4 Anne, c. 16, s. 5. *Read* v. *Thoyts*, 515

COUNSEL.

See TREASON, 4, 8.

1. Where a special plea has been demurred to, the defendant's counsel has no right at the trial to allude to the statements in it in his address to the jury. *Ingram* v. *Lawson*, 326

2. The counsel for the prosecution, in opening a case of murder, has a right to put hypothetically the case of an attack upon the character of any particular witness for the Crown, and to state, that if such attack should be made he shall be prepared to rebut it. He has also a right to read to the jury the general observations of a learned Judge, made in a case tried some years before, on the nature and effect of circumstantial evidence—if he adopts them as his own opinions and makes them part of his own address to the jury. *Regina* v. *Courvoisier*, 362

3. If additional evidence be discovered during the progress of a case, the counsel for the prosecution is not at liberty to open the nature of such evidence in an additional address to the jury, *Ibid.*

4. Where a Queen's counsel was instructed to argue a criminal case for a defendant, on a point reserved for the consideration of the fifteen Judges, but at the time fixed for the argument had not obtained a licence from her Majesty to argue against the Crown, but only a certificate from the Secretary of State's office, the Court directed the argument to stand over for such licence to be obtained. *Regina* v. *Jones*, 401

5. Where no counsel is engaged for the prosecution, and the depositions are handed, by direction of the Court, to a gentleman at the bar, he should consider himself as counsel for the Crown, and act in all respects as he would if he had been instructed by the prosecutor; and should not consider himself merely as acting in assistance of the Judge, by examining the witnesses. *Regina* v. *Littleton*, 671

6. The fifteen Judges, on a case reserved, will not hear counsel for the prosecution if no counsel appears for the prisoner. *Regina* v. *Davies*, 428

COURT ROLL.

See EVIDENCE, 2, 3.

COVENANT.

See LANDLORD AND TENANT, 6, 7, 8, 9, 10.

COVENANT TO INSURE.

See LANDLORD AND TENANT, 9, 10.

COVENANT TO REPAIR.

See LANDLORD AND TENANT, 6, 8.

CROSS-EXAMINATION.

1. On the trial of an information by the Attorney-General for penalties, the defendant (who had been held to bail) had subpœnaed the officer from the Queen's Remembrancer's Office to produce the affidavit on which he had been held to bail, with a view of being able to give it in evidence to cross-examine the person who had made the affidavit, if he should be called as a witness on the trial. The person who made the affidavit was called as a witness on the trial, and, for the purpose of cross-examining him the defendant's counsel wished to put in the affidavit: —*Held*, that the officer was bound to produce it, and that the defendant had a right to make use of it in this way; but that if the affidavit was made by another deponent besides the witness, and related to other persons besides the defendant, the latter would be only entitled to use so much of the affidavit as was sworn by the witness, and as related to the defendant himself. *The Attorney-General* v. *Bond*, 189

2. On an application for a new trial, one of the witnesses made an affidavit. The same witness was called on the second trial. It was proposed to cross-examine the witness from an office copy of her affidavit, which was or-

dered by a Judge's order (in the usual form) to be admitted as a true copy:—*Held*, that this might be done, and that it was not necessary to have the original affidavit to cross-examine upon. *Davies* v. *Davies*, 252

3. If it be shewn that depositions were regularly returned by the magistrate to the proper officer, and it be proved by the latter that they cannot be found, after diligent search, the prisoner's counsel may cross-examine from copies of them, those copies being proved to be correct by the magistrate's clerk. *Regina* v. *Shellard*, 277

4. A prisoner's counsel has no right to ask a witness for the prosecution, whether he has *always* told the same story, the question ought to be—"Have you always said so except before the magistrates?" *Ibid.*

5. On the trial of A., for attempting to discharge loaded arms at B., B., with a view to discredit his evidence, was cross-examined as to whether he had not used violent language towards his father, which he admitted:—*Held*, that on re-examination, B. might be asked as to how his father had acted towards him before he used the language that had been cross-examined to. *Regina* v. *St. George*, 483

6. It was proposed to ask a witness as to what another witness had said on other occasions than that which was the subject of the trial:—*Held*, that that could not be done, as what a witness has said at other times, is only matter for the cross-examination of the witness himself, *Ibid.*

7. In a case of rape it appeared that the prisoner had been taken before the mayor of N., charged with this offence, and that the prosecutrix was then sworn and her statement taken down by the mayor, who then asked her some further questions, the answers to which were not taken down, and the prisoner was discharged. That which was taken down by the mayor was not read over to the prosecutrix, neither was it signed by her or by the mayor. The prisoner was afterwards committed for trial by other magistrates:—*Held*, that at the trial the prisoner's counsel might cross-examine the prosecutrix as to what she said before the mayor of N. without the production of that which was taken down in that examination. *Regina* v. *Griffiths*, 746

8. A witness at the trial gave evidence which was different from her deposition before the magistrate. The deposition was signed by a mark which she denied to be hers. Neither the magistrate nor his clerk were at the trial; but a constable proved that he was at the examination, and heard her deposition read over to her, and saw her with a pen in her hand, but did not see her make her mark. He also proved the magistrate's signature, and, after reading the deposition (which preceded his own which he had signed), he stated that he believed that that was the deposition which was read over to the witness:—*Held*, that this deposition might be read to the witness by the officer of the Court for the Judge to examine her upon it. *Regina* v. *Hallett*, 748

CRUELTY TO ANIMALS,

See POUND-KEEPER, 4, 5, 6, 7.

CUSTOM OF TRADE.

See AGENT'S COMMISSION — AUCTIONEER'S COMMISSION—BROKER'S COMMISSION — CARPENTER— COLLIERS.

CUTTING.

See WOUNDING.

DAMAGES.

See APPRENTICE—LANDLORD AND TENANT, 6—NEGLIGENCE, 8.

DAMAGES, MITIGATION OF.

See PLEADING, 6.

DECLARATION IN ARTICULO MORTIS.

See DYING DECLARATION.

DEED.

See ATTESTATION—FORGERY, 7.

DEMOLISHING HOUSES.

1. A. and others were indicted for feloniously demolishing the house of B. It was proved that A. and a mob of persons assembled at H.; A. there addressed the mob in violent language, and led them in a direction towards a police office about a mile from H., some of the mob from time to time leaving and others joining. At the police office the mob broke the windows, and then went and attacked the house of B., and set it on fire—A. not being present at the attack on the house or at the fire:—*Held*, that on this state of facts A. ought not to be convicted of the demolition, as it did not sufficiently appear what the original design of the mob at H. was, nor whether any of the mob, who were at H., were the persons who demolished B.'s house. *Regina* v. *Howell*, 437

2. If rioters attack a house and have begun to demolish it, but leave off of their own accord after having gone a certain length, and before the act of demolition is completed, this is evidence from which a jury might infer that they did not intend to demolish the house; but if the mob were prevented from going on by the interference of the police or any other force, that would be evidence to shew that they were compelled to desist from that which they had designed, and it would be for the jury to infer that they had begun to demolish within the stat. 7 & 8 Geo. 4, c. 80, s. 8. *Ibid.*

3. Destroying moveable shop-shutters is not a beginning to demolish within that statute, as they are not part of the freehold, *Ibid.*

4. If rioters destroy a house by fire, that is as much a demolition within the stat. 7 & 8 Geo. 4, c. 30, s. 8, as if any other mode of destruction were used, *Ibid.*

5. If a part of the object of rioters be to demolish a house, it makes no difference that they also acted with another object, such as to injure a person who had taken refuge there, *Ibid.*

DEMURRAGE.

If there be no contract as to demurrage a shipowner cannot, on a common count for demurrage, recover for the detaining of the ship for an unreasonable time in loading and unloading, but must declare specially. *Horn* v. *Bensusan*, 709

DEPOSITION.

See CONFESSION, 1 — CROSS-EXAMINATION, 3, 7, 8—TREASON, 5.

1. In a case affecting the life of a party, it is very desirable that the magistrate who took the depositions against a prisoner with his own hand, should be called as a witness before the depositions are read to prove the correctness of what he took down; but it is not absolutely necessary, in point of law, that he should be called, and the depositions, if admissible in other respects, may be read on proof of his hand-writing. *Regina* v. *Pikesley*, 124

2. Where a magistrate returns with the depositions that a prisoner was sworn and made a statement, the statement cannot be received in evidence against him, although a witness state that he was not in fact sworn, *Ibid.*

3. On a trial for murder, the deposition on oath of the prisoner, taken before the coroner, on the inquest held on the body of the deceased, is not receivable in evidence. *Regina* v. *Owen*, 238

4. The deposition of a witness taken before the coroner on an inquiry touching the death of a person killed by a collision between a brig and a barge, is receivable in evidence in an action for the negligent management of the brig, if the witness be shewn to be beyond sea. *Sills* v. *Brown*, 601

DEPOSITION ON INTERROGATORIES.

See PERJURY, 2, 5.

1. It is no objection at Nisi Prius to the reception of depositions taken on interrogatories, that there was an alleged breach of faith on the part of the defendant in examining witnesses on interrogatories at all. But if there was any irregularity in proceeding with the commission, as for instance, if it were executed without any notice to the plaintiff to enable him, if he pleased, to put cross-interrogatories, such irregularity is a good objection to the admissibility of the depositions, and the Court, if they have been received at Nisi Prius, will grant a new trial, and direct a fresh commission to be issued. *Steinkeller* v. *Newton*, 313

2. To enable a witness to use a paper written by himself for the purpose of refreshing his memory, it must be shewn that the paper was written contemporaneously with the transaction it refers to; and where a witness, who had been examined on interrogatories in a foreign country, stated in one of his answers the contents of a letter which was not produced:—*Held*, on the trial of the cause in England, that so much of the answer as related to the contents of the letter was not receivable in evidence, although it was urged in support of its admissibility that there were no means, as the witness was out of the jurisdiction of the English Courts, of compelling the production of the letter, *Ibid.*

DESTROYING MINING ENGINES.

See MINING ENGINES.

DESTROYING A WILL.

See WILL, SECRETING.

DISCLAIMER.

See LANDLORD AND TENANT, 11, 12.

DISOBEDIENCE OF AN ORDER FOR COSTS.

The quarter sessions of a county made regulations as to the expenses to be allowed in cases of felony, and by one of them directed that the taxed bill of costs should be annexed to the order for their payment. These regulations were confirmed by a Judge under the stat. 7 Geo. 4, c. 64, s. 26. In a case of felony the clerk of assize made out the items of the costs allowed, and on the other half of the same sheet of paper wrote the order for payment of their amount. The attorney for the prosecution tore off the first half of the paper, which contained the items, and presented the other half to the county treasurer for payment. The treasurer refused to pay:—*Held*, that, on account of the mutilation of the order, the treasurer was not indictable for this refusal. *Regina* v. *Jones*, 401

DYING DECLARATION.

1. A boy between 10 and 11 years of age was mortally wounded, and died the next day. On the evening of the day on which he was wounded, he was told by a surgeon that he could not recover. The boy made no reply, but appeared dejected. It appeared from his answers to questions put to him that he was aware that he would be punished hereafter if he said what was untrue:—*Held*, that a declaration made by him at this time was receivable in evidence on the trial of a person for killing him, as being a declaration in articulo mortis. *Regina* v. *Perkins*, 395

2. In a case of murder it appeared that two days before the death of the deceased, the surgeon told her that she was in a very precarious state; and that on the day before her death, when she had become much worse, she said to the surgeon, that she found herself growing worse, and that she *had been in hopes* she would have got better, but *as she was getting worse*, she

thought it her duty to mention what had taken place. Immediately after this she made a statement:—*Held*, that this statement was not receivable in evidence as a declaration in articulo mortis, as it did not sufficiently appear that, at the time of the making of it, the deceased was without hope of recovery. *Regina* v. *Megson*, 418

EASEMENT.

1. To an action of trespass on land the defendant pleaded that for 20, 30, 40, and 60 years he and the occupiers of a mill had (as an easement) gone on the land to repair the banks of a stream which flowed to the mill. Replication, denying the rights claimed.

It appeared that within forty years B. had been lessee of the mill under one landlord, and of the land under another:—*Held*, that this was such a unity of posession as prevented his having an easement on the land. *Clay* v. *Thackrah*, 47

2. *Held*, also, that this unity of possession need not be specially replied; and that without a special replication the lease of the land to B., and letters written by B. while lessee of the mill, and before he became lessee of the land, were receivable in evidence. *Ibid.*

3. *Held*, also, that B.'s lease of the land having expired more than 30 years ago, the acts of the occupiers of the mill in repairing the banks ever since that time, without any leave asked by them, or any notice from the other side of any adverse claim, must be taken to be done as of right. *Ibid.*

4. Form of plea and replication. *Ibid.*

EJECTMENT.

See LANDLORD AND TENANT.

1. In ejectment the lessor of the plaintiff made out his title as the heir of W. G. The defendant put in the will of W. G. made in 1837, devising the property to the lessor of the plaintiff and T. G.:—*Held*, that the lessor of the plaintiff might put in another will of W. G. made in 1838, devising the whole property to the lessor of the plaintiff, and that the lessor of the plaintiff was not bound to make this will part of his original case. *Doe* d. *Goslee* v. *Goslee*, 46

2. Under these circumstances the defendant's counsel will be allowed to reply on the new case set up by the lessor of the plaintiff, and the counsel for the plaintiff has the general reply. *Ibid.*

3. A. in the year 1819 agreed to purchase lands of B. for £670, and and paid a deposit of £10. The agreement did not contain any stipulation that A. should be let into possession, but in fact he was so at Michaelmas in the year 1819. A. continued in possession, and neither paid any more of the purchase-money nor any rent or interest, and in 1822 A. cut down timber, and in 5 Geo. 4, levied a fine with proclamations, and mortgaged the property, and after that died, leaving the property, subject to the mortgage, to his daughters:—*Held*, that these facts were no bar to B. in ejectment brought within twenty years after, Michaelmas, 1839, as A. coming in under an intended purchase was in equity the owner of the land, with a liability to pay the purchase-money, and his cutting trees was consistent with his holding in that character, and not adversely to the rights of the vendor, to whom at law he was tenant at will. *Doe* d. *Counsell* v. *Caperton*, 112

4. In ejectment by parish officers to recover a cottage, entries in the books of a deceased tradesman, of charges for the building of the cottage, which are there stated to have been paid by the lord of the manor, are not admissible in evidence on the part of the defendant. *Doe* d. *Haden* v. *Burton*, 254

5. If A. be put into possession of a cottage by parish officers, and the lord of the manor prevail on A. to give up the possession of the cottage to

him, and the lord of the manor put B. into possession, and the parish officers bring an ejectment against B., B. cannot set up a title in the lord of the manor, as under these circumstances neither the lord of the manor nor B. can set up any title which A. could not set up; and if the cottage really belonged to the lord of the manor, he must bring an ejectment for it. *Ibid.*

6. Whether in ejectment the lessor of the plaintiff must have a certificate under the stat. 3 & 4 Vict. c. 24, to entitle him to costs—*quære*. *Doe* d. *Hughes* v. *Derry*, 494

7. A. was possessed of lands for more than 20 years, and died in 1817. His widow had possession from that time till her death in 1838. B. was the eldest son of A. and his wife:—*Held*, that though B. could not recover in ejectment as the heir of his father, because more than 20 years had elapsed from the death of his father, yet that the jury might infer that the property belonged to B.'s mother, and survived to her on the death of his father, and descended to B. as her heir on her death in 1838. *Doe* d. *Bennett* v. *Long*, 773

EMBEZZLEMENT.

See LARCENY, 1.

ENGINES FOR WORKING MINES, DESTROYING.

See MINING ENGINES.

ENGRAVING FORGED FOREIGN NOTE PLATES.

See FORGERY, 1, 9.

ESTATE.

See EJECTMENT, 7.

EVIDENCE.

See ADMISSION.—BIGAMY.—COMPANY, 1.—CONFESSION.— CONSPIRACY.—CORPORATION, 1, 2.—CROSS-EXAMINATION. — DEPOSITION. — EASEMENT, 3.—EXAMINATION OF WITNESSES.—LIBEL, 4, 5, 8.—NEGLIGENCE, 8. — NON-PAROCHIAL REGISTERS.—NOTICE TO PRODUCE. — PLEADING, 1, 4, 5.— PREVIOUS CONVICTION. — RAPE, 6, 7. — SCHOOL.—SHERIFF, 1, 2.—WITNESS.

1. In an action against the directors of an intended company, it was proved, (in order to let in secondary evidence of their minute-books, called for under a notice to produce), that four months before the trial, the late secretary had the books in a desk at the office of the Company, and that he then gave up the key of the desk to the manager of the Company, who acted for the directors:—*Held*, sufficient. *Bell* v. *Francis*, 66

2. A court roll stating that a surrender was by power of attorney, would be secondary evidence of the power of attorney if the power of attorney cannot be found after a sufficient search. *Doe* d. *Counsell* v. *Caperton*, 112

3. The steward of a manor proved that where a surrender was by power of attorney, the practice was to keep the power of attorney with the court rolls. The power in question which was for a surrender in 1814, could not be found either with the court rolls or any where in the office in which the court rolls had been kept ever since 1814, both by the present steward and his predecessor, who was steward in 1814:—*Held*, sufficient to let in secondary evidence. *Ibid.*

4. In a former action between the same parties, in which the plaintiff sued in person, certain statements were made in the defendant's plea which were not denied by the replication, which only denied other parts of the plea; there had been a trial, but no judgment:—*Held*, that neither the issue delivered by the plaintiff himself, nor the Nisi Prius record in the former action, was admissible in evidence, as proof of an admission of the facts stated in the plea in the former action, and not denied by the replication. *Holt* v. *Miers*, 191

5. A letter written by a party is not admissible in evidence in his own favour, except as a notice or a demand. *Richards* v. *Frankum*, 221

6. On the trial of an action of detinue for a promissory note, the note was called for by the plaintiff's counsel, and produced by the defendant's counsel, and had on the back this memorandum:—"This draft was signed in my presence, on the date within named. (Signed) N. D.:"—*Held*, that the plaintiff must call N. D. to prove the making of the note:—*Held*, also, that if the plaintiff had the note read in evidence, he was, if required by the other side, bound to read an indorsement on the note as well as what was written on the face of it. *Ibid.*

7. The note was indorsed by the plaintiff as follows:—"I hereby assign this draft, and all benefit of the money secured thereby, to J. G., of &c., and order the within-named T. F. H. [the maker of the note] to pay him the amount thereof, and all interest in respect thereof. (Signed) H. O. R.:"—*Held*, that this indorsement did not require a stamp. *Ibid.*

8. The document delivered out by the registrar of the Court of Chancery, as the order of the court, is the original order, and to make it evidence it is not necessary that it should be compared with any book of the orders of the court. *Corporation of Ludlow* v. *Charlton*, 242

9. In ejectment by parish officers to recover a cottage, entries in the books of a deceased tradesman of charges for the building of the cottage which are there stated to have been paid by the lord of the manor are not admissible in evidence on the part of the defendant. *Doe* d. *Haden* v. *Burton*, 254

10. It is no objection at Nisi Prius to the reception of depositions taken on interrogatories, that there was an alleged breach of faith on the part of the defendant in examining witnesses on interrogatories at all. But if there was any irregularity in proceeding with the commission, as for instance, if it were executed without any notice to the plaintiff to enable him, if he pleased, to put cross interrogatories, such irregularity is a good objection to the admissibility of the depositions, and the Court, if they have been received at Nisi Prius, will grant a new trial, and direct a fresh commission to be issued. *Steinkeller* v. *Newton*, 313

11. To enable a witness to use a paper written by himself for the purpose of refreshing his memory, it must be shewn that the paper was written contemporaneously with the transaction it refers to. A witness, who had been examined on interrogatories in a foreign country, stated in one of his answers the contents of a letter which was not produced:—*Held*, on the trial of the cause in England, that so much of the answer as related to the contents of the letter was not receivable in evidence, although it was urged in support of its admissibility that there were no means, as the witness was out of the jurisdiction of the English Courts, of compelling the production of the letter. *Ibid.*

12. A declaration on a check on a banker, stated that the plaintiff drew his check on W. & Co., and delivered it to B. L., who transferred it to the the plaintiff. The defendant pleaded, 1st, that the check was given to B. L., as the nominal value of counters to play at an unlawful game, as B. L. knew, and that before the plaintiff took the check he had notice of the premises; and 2nd, a similar plea, in which, instead of an averment of notice, it was averred that the plaintiff gave no value for the check. Replication, denying the notice, and stating that the plaintiff gave a good consideration for the check. For the defendants the plaintiff's attorney was called, who was also the attorney of B. L.:—*Held*, that he might be asked where he last saw B.L, and whether he had ever seen

B. L. and the plaintiff together; but that he could not be asked whether he had ever seen this check in B. L.'s possession. *Bingham* v. *Stanley*, 374

13. A prisoner was taken into custody at the house of his brother on a charge of abduction. When he was taken a letter was found in a writing-desk, in the room in which he and his brother were. The letter was directed to a person in the neighbourhood of the prisoner's late residence. The police officer was going to open it, when the prisoner told him it had nothing to do with the business that he had come about:—*Held*, that the letter was receivable in evidence on the trial of the prisoner for the abduction. *Regina* v. *Barratt*, 387

14. A. and B. were separately indicted for publishing the same libel. Both indictments contained the same prefatory allegations. A. was tried first; and on the trial of B. such of the witnesses as had been also examined on the trial of A., had (by consent) their evidence read over to them from the Judge's notes, B. being allowed to further cross-examine them. *Regina* v. *Lovett*, 462

15. It was proved, that, before the bringing of the action Mr. L., who was the plaintiff's attorney on the record, had written to the defendant for payment of the debt for which the action was brought, and it was proposed on the part of the defendant to give evidence of what Mr. L. had said after he had so written, and before the action:—*Held*, that this evidence was not receivable without further proof of the agency of Mr. L. *Pope* v. *Andrews*, 564

16. The depositions of a witness taken before the coroner on an inquiry touching the death of a person killed by a collision between a brig and a barge, is receivable in evidence in an action for the negligent management of the brig, if the witness be shewn to be beyond sea. *Sills* v. *Brown*, 601

17. A nautical witness cannot be asked on the trial of an action for the negligent management of a ship, whether he thinks having heard the evidence in the cause, that the conduct of the captain was correct or not. *Ibid.*

18. Evidence of a practice in contravention of a by-law is not receivable. *Ibid.*

19. A witness cannot be called to contradict another with respect to a statement suggested to have been made, if there be not an express denial by the party who is supposed to have made it, of his having done so. *Long* v. *Hitchcock*, 619

20. The plaintiff is to prove his case to the satisfaction of the jury; and, if he leaves it doubtful, either from the circumstances which surround it, or from the character of his witness, the defendant is entitled to the verdict. *Ibid.*

21. A plaintiff declared specially in assumpsit, that in consideration that the plaintiff had sold and delivered twenty tons of best Dutch lead to the defendant, the latter had promised to deliver to the plaintiff prussiate of potash to the same amount; and the plaintiff averred the delivery of the twenty tons of best Dutch lead, and stated as a breach, that the defendant would not deliver the full quantity of potash. The defendant pleaded non assumpsit:—*Held*, that as the defendant had not pleaded that the plaintiff had not delivered best Duch lead, he could not go into evidence to shew that the lead was of inferior quality. *Pegg* v. *Stead*, 636

21. On a count for a quantum valebant, the plaintiff may give evidence of an agreed price for the goods, and the defendant, in such a case, on a plea of non assumpsit, may also go into evidence to induce the jury not to give that price, by shewing that the articles delivered were inferior to those that the price was agreed to be paid for. *Ibid.*

EVIDENCE IN REPLY.

See TREASON, 18.

EXAMINATION OF WITNESSES.

In criminal cases, though the counsel for the proseoution may content himself with putting into the box a witness whose name is on the back of the bill, without asking him any questions on the part of the prosecution; yet, *semble*, that it is better that he should be examined, whether his evidence be favourable to the prosecution or not, as the only object of the investigation is to discover the truth. *Regina* v. *Bull*, 22

EXECUTION.

See BILL OF SALE.

EXPENSES OF PROSECUTIONS.

See DISOBEDIENCE OF ORDER FOR COSTS.—HIGHWAY, 1, 2, 3.

EXPENSES OF WITNESS.

See WITNESS, 5.

FALSE IMPRISONMENT.

See IMPRISONMENT.

FALSE PRETENCES.

An indictment for false pretences charged, in the first count, that the defendant "unlawfully did falsely pretend to one J. R., that he, the said J. T. was sent by W. P. for an order to go to J. B. for a pair of shoes," by means of which false pretence he did obtain from J. B. a pair of shoes of the goods and chattels of J. B., with intent to defraud J. L. of the price of the said shoes, to wit, nine shillings, of the monies of J. L. The second count charged, that he falsely pretended to J. L. that W. P. had said that J. L. was to give him, the said J. T. (the defendant), an order to go to J. B. for a pair of shoes, by means of which false pretence he did obtain from J. B., in the name of J. L., a pair of shoes of the goods of J. B., with intent to defraud J. L. of the same:—*Held*, that both these counts were bad, in arrest of judgment, as neither of them charged a sufficient false pretence within the stat. 7 & 8 Geo. 4, c. 29, s. 53. *Regina* v. *Tully*, 227

FATHER.

See CHILDREN.

FELON'S GOODS.

See HOUSE AND GOODS OF A CONVICTED FELON.

FELONY, COMPOUNDING.

See FOREGOING A PROSECUTION.

FELONY WHICH INCLUDES AN ASSAULT.

See ASSAULT, 6, 7, 8, 10, 11, 12, 13, 14.

FIGHTING.

All struggles in anger, whether by fighting or wrestling, or any other mode, are unlawful, and death occasioned by them is manslaughter at least. *Regina* v. *Canniff*, 359

FIRE.

See ARSON.

FOOD SUPPLIED TO IMPOUNDED CATTLE.

See POUND-KEEPER, 4, 5, 6, 7.

FOREIGN NOTE PLATE, FORGED.

See FORGERY, 1—9.

FORFEITURE.

See LANDLORD AND TENANT, 9, 10, 11, 12.

FORGERY.

See CHELSEA PENSION.

1. The 18th section of the stat. 11 Geo. & 1 Will. 4, c. 66, applies to

plates of promissory notes of persons carrying on their business of bankers in the province of Upper Canada. *Regina* v. *Hannon*, 11

2. A paper in the following form *held* to be a request for the delivery of goods, though not addressed to any one:—"Augt. 3, '39—One 16-in. helmet scoop—one 4 qt. kettle—Jas. Hayward,' *Regina* v. *Pulbrook*, 37

3. A prisoner was indicted on the stat. 2 & 3 Will 4, c. 123, s. 3, for forging a warrant for the payment of money (not setting it out). The forged paper was as follows:—" This is to satisfy that R. R. *as* swept the flues and cleaned the bilges, and repaired four bridges of the Princess Victoria, (signed) J. N. 4*l*. 10*s*. 0*d*." It was proved, that, by the course of dealing between the parties, this voucher, if genuine, would have authorized L. & Co. to pay 4*l*. 10*s*. 0*d*.:—*Held*, that it is not necessary that a warrant for the payment of money should be addressed to any particular person; and that as it appeared that this document, if genuine, would have been a voucher for the payment of the money mentioned in it, that was a sufficient proof of the allegation that it was a warrant for the payment of money. *Regina* v. *Rogers*, 41

4. If, in an indictment for forgery, the intrument be described and not set out, it is matter of evidence whether the instrument comes within the designation given of it in the indictment or not; and averments to shew that the document comes *within* the designation given of it in the indictment, are now (in this form of indicting) unnecessary. *Ibid.*

5. A forged paper, in the following form,—" Please let the lad have a hat, and I will answer for the money. E. B.," is a forged request for the delivery of goods, and is not the less so because it may also be a forged undertaking for the payment of money. *Regina* v. *White*, 282

6. A count in an indictment for forging a request for the delivery of goods, which describes the forged instrument as " a certain forged request for the delivery of goods to one J. R.," is good under the stat. 2 & 3 Will. 4, c. 122, s. 2, and is not too general. *Regina* v. *Robson*, 423

7. A count in an indictment for uttering a forged deed described it as "a certain deed, purporting to be made on the 1st day of March, 1837, between R. W. of the one part, and D. G. of the other part, purporting to be an under-lease by the said R. W. to the said D. G. of certain lands, tenements, and premises therein mentioned, subject to the payment of the yearly rent of £8, payable on the 1st day of March in every year, and purporting to contain a covenant by the said D. G. with the said R. W. for the payment, by the said D. G. to the said R. W., of the yearly rent of £8:"—*Held*, good, under the stat. 2 & 3 Will. 4, c. 123, s. 2. *Regina* v. *Davies*, 427

8. If a person knew the acceptance of a bill of exchange to be forged, and uttered it as true, and believed that his bankers, to whom he uttered it, would advance money on it, which they would not otherwise, that is ample evidence of an intent to defraud, and evidence upon which a jury ought to act; and a person is not the less guilty of forgery because he may intend ultimately to take up the forged bill, and may suppose that the party whose name is forged will be no loser, and the fact that the bill has been since paid by the prisoner will make no difference, if the offence has once been complete at the time of the uttering. *Regina* v. *Geach*, 499

9. Three prisoners (foreigners) were indicted for feloniously engraving and making two parts of a promissory note of the Emperor of Russia. The indictment was framed upon the stat. 11 Geo. 4 & 1 W. 4, c. 66, s. 19. The plates were engraved by an English-

man, who was an innocent agent in the transaction. It appeared that two of the prisoners only were present at the time when the order was given for the engraving of the plates, but they said they were employed to get it done by a third person, and there was some evidence to connect the third prisoner with the other two in subsequent parts of the transaction. The questions left to the jury were, 1st, whether the two who gave the order for the engraving knew the nature of the instrument; and, 2ndly, whether all three concurred in the order given. The Judge told the jury that in order to find all three guilty, they must be satisfied that they jointly employed the engraver, but that it was not necessary that they should all be present when the order was given, as it would be sufficient if one first communicated to the other two, and that all three concurred in the employment of the engraver. His Lordship also said, that he was inclined to think that if the prisoners, by means of the engraver, caused the plates to be engraved, they would be within the provisions of the statute, whether they knew the nature of the instrument engraved or not; but intimated that, if it became necessary, that matter might be made the subject of further consideration. The jury found the two guilty who gave the order, and added that they considered they knew the nature of the instrument. The third prisoner was acquitted. *Regina* v. *Mazeau.* 676

FOREGOING A PROSECUTION.

The law does not authorize a private person to forego a prosecution upon any terms; and even if a promise be given and broken in such a manner as a jury would consider scandalous, yet, in point of law, that will not make any difference. *Regina* v. *Daly,* 342

FRAUD.

See BILL OF SALE.

FRAUDS, STATUTE OF.

See GOODS SOLD.

FREIGHT.

See BROKER'S COMMISSION.

GOODS OF A CONVICTED FELON.

See HOUSE AND GOODS OF A CONVICTED FELON.

GOODS LENT.

A horse being for sale, A. asked the agent of the vendor to let him have the horse for the purpose of trying it, and the agent did so:—*Held,* that A. was entitled to put a competent person on the horse for the purpose of trying it, and was not limited to merely trying it himself. *Lord Camoys* v. *Scurr,* 383

GOODS SOLD.

See PLEADING, 4, 5.

In assumpsit for goods sold and delivered, where the price is above £10, and nothing was paid as earnest to bind the bargain, nor was there any memorandum in writing, signed by the defendant or his agent: two things must be proved to entitle the plaintiff to recover; first, that the defendant in fact ordered the goods; and secondly, that he accepted them with an intent to take to them as owner. *Smith* v. *Rolt,* 696

GRAND JURY.

1. The Grand Jury had come into Court and had been discharged and had left the Court, but had neither left the building nor separated. The Judges directed them to be sent for back into Court, and directed another bill of indictment (the witnesses on which were going abroad) to be sent before them. *Regina* v. *Holloway,* 43

2. If one of the Grand Jurors be a Quaker, the indictments should commence, "The Jurors for our Lady the Queen upon their oath and affirmation present," &c. 78

GUARANTEE.

In an action for goods sold the defendant pleaded that the defendant and M. had agreed with the plaintiffs that M. should give a guarantee for payment of the debt by instalments, and that the guarantee was given and was accepted by the plaintiffs in satisfaction. Replication—denying the agreement, and denying that the plaintiffs had accepted the guarantee in satisfaction. It appeared that, before the bringing of the action, Mr. L., who was the plaintiff's attorney on the record, had written to the defendant for payment of the debt, and it was proposed to give evidence of what Mr. L. had said after he had so written and before the action:—*Held*, that such evidence was not receivable without further proof of the agency of Mr. L. It was afterwards proved by Mr. L. that M. had asked him to propose to the plaintiff to accept his guarantee, and that Mr. L. having consented to do so, M. signed a guarantee, which was on the next day sent by Mr. L. to the plaintiffs, who kept it three weeks and then returned it.

Held, that if the plaintiffs did not return the guarantee within a reasonable time, they must be taken to have accepted it, and that unexplained—three weeks was an unreasonable time:—*Held*, also, that if M. was worth nothing, and was a mere man of straw, that fact would make no difference on these pleadings, as the plaintiffs had not replied fraud, but had denied that they had accepted the guarantee. *Pope* v. *Andrews*, 564

HABEAS CORPUS ACT.

See POSTPONING TRIAL, 6.

HIGH TREASON.

See TREASON.

HIGHWAY.

1. A prosecutor had obtained a summons under the 94th section of the Highway Act, 5 & 6 Will. 4, c. 50, calling on the parish surveyors to shew cause why a highway should not be repaired. The surveyors denied the liability of the parish to repair, and the magistrates (under the 95th section) ordered an indictment against the inhabitants of the parish, which was preferred, and was tried as a traverse on the Crown side of the assizes, and the defendants found guilty:—*Held*, that the prosecutor was entitled to an order, under the 95th section, to have his costs paid out of the highway rate, and that the statute as to this was imperative, and left no discretion whatever in the Judge. *Regina* v. *Inhab. of Yarkhill*, 218

2. A complaint was made to magistrates, under the 94th section of the Highway Act, 5 & 6 Will. 4, c. 50, that a way alleged to be a highway was out of repair; the magistrates ordered an indictment against the inhabitants of the parish, which was found, and removed by certiorari, and on the trial of it the defendants were acquitted, on the ground that it was not a highway. The prosecutor applied for costs to be paid out of the highway rate, under the 95th section of the act. It was objected that this provision as to costs, only applied where the existence of a highway was not disputed, and also that it did not apply when the indictment was removed by certiorari. The Judge refused the order. *Regina* v. *Inhab. of Chedworth*, 285

3. *Semble*, that the 95th section of the act as to payment of costs out of the highway rate, and the 98th section as to costs to be paid by any defendant where the defence is frivolous, are distinct in their operation, and are not to be connected. *Ibid.*

4. *Semble*, that the magistrates are not bound to make their order in terms exactly following those contained in the information. *Ibid.*

HORSE-STEALING.

A., who intended to sell his mare, sent his servant with her to M. fair, the servant having no authority either to sell the mare or deal with her in any way. The prisoner asked the servant the price, and desired the servant to trot her out, and the prisoner then went to two men and having talked to them went away. These two men then came up and persuaded the servant to exchange the mare for a horse they had, and they would give £24 for the chop. They changed the saddles, and without giving any money rode away with the mare, leaving the servant with a horse of little value. Four days after the prisoner sold the mare at B., stating that he had got her in a chop at M. fair:—*Held*, that as the servant had the mere charge of the mare, and had no right to deal with the property in her, the prisoner ought to be convicted of stealing her, provided that the jury were satisfied that the prisoner was in league with the two other men, and that they three, by a fraud in which each of them was to take his part, and did take his part, induced the servant to part with the possession of the mare under colour of an exchange, but they intending all the while to steal the mare. *Regina* v. *Sheppard*, 121

HOUSE AND GOODS OF A CONVICTED FELON.

A prisoner was indicted for breaking into the house of Elizabeth A. and stealing her goods. There was a second count, laying the property of the goods in the Queen. It was shewn by proof of the record that the husband of Elizabeth A. had been convicted of felony, and it was also proved that he was still in prison under his sentence, and that the articles stolen were his before his conviction, and had remained in the house from the time of his apprehension, and that the wife continued in the possession of the house and goods till they were stolen by the prisoner:—*Held*, that the prisoner might be properly convicted of larceny on the second count, which laid the property of the goods in the Queen, although there had been no office found, and that he could not be convicted of housebreaking, as that part of the indictment which laid the goods and the house to be those of Elizabeth A. could not be supported. *Regina* v. *Whitehead*, 429

HOUSE-BREAKING.

See HOUSE AND GOODS OF A CONVICTED FELON.

HUSBAND AND WIFE.

1. The general rule is, that a wife cannot bind her husband by her contract except as his agent; but in cases of orders given by the wife in those departments of her husband's household which she has under her control, or of orders for articles which are necessary for the wife, such as clothes, the jury (if the wife be living with the husband) ought to infer agency, if nothing appear to the contrary; but if the order is excessive in point of extent, and such as the husband never would have authorized, that will alone be sufficient to repel the inference of agency. *Freestone* v. *Butcher*, 643

2. If it be proved that the wife has a separate income, that of itself goes to repel the inference of agency; and evidence that the plaintiff has made out the invoices to the wife, and has drawn bills of exchange on her for part of the amount, which she has accepted in her own name, payable at her own bankers' from her separate funds, also goes to prove that the wife was not acting as the agent of the husband; and the fact

that the husband sold some of the goods which were supplied to the wife and received the money for them, will not of itself make the husband liable in point of law to pay for them; but it is a fact for the consideration of the jury in determining whether the goods were supplied on the credit of the husband, and whether the wife was the agent of her husband. *Ibid.*

IMPRISONMENT.

1. Proof of annoyance and disturbance by a person present at a meeting, such as crying "hear, hear," and putting questions to a speaker, and making observations on his statements, will not justify the Chairman of the meeting in giving such person in charge to the police; but, to justify such a course of proceeding, it must be shewn that what was done amounted to a breach of the peace. *Wooding* v. *Oxley*, 1

2. A. telling a policeman to take charge of B., is the same as his telling the policeman to take B. into custody, and is sufficient to support an action for false imprisonment by B. against A. *Wheeler* v. *Whiting*, 262

3. *Semble*, that in an action for false imprisonment, a plea that the defendant was possessed of a house, and that the plaintiff was there making a great disturbance, and refused to depart when requested, and was in great heat and fury, ready and desirous to make an affray, and cause a breach of the peace, whereupon the defendant gave the plaintiff into custody, is bad. *Ibid.*

INDEMNITY.

See CONVICTION, 2.

INDICTMENT.

See ACCESSARY BEFORE THE FACT, 3, 4.—AMENDMENT, 7, 8, 9.—ASSAULTING A GAMEKEEPER.—BURGLARY, 1.—CHELSEA PENSION.—COIN.—COMPANY, 7.—FALSE PRETENCES. — FORGERY, 4, 6, 7. — HIGHWAY, 1.—PERJURY, 2, 5.—RAPE, 8.—RECEIVERS, 1.—ROBBERY. —VENUE. —WILL SECRETING.

A. and B. were indicted for the offence of robbery. The jury found that A. took the property of the prosecutor from him by violence, and that B. was present during part of the time, and that he was a party with A. to a design to bring the prosecutor to the place where he was robbed by A., and to obtain property from him on a false charge of an unnatural crime, but that he was not aiding or assisting in or privy to the taking of the property from the prosecutor by violence:— *Held*, by all the Judges, that in order to convict B., the indictment should have been framed on the statute 1 Vict. c. 87, s. 4, and that he could not since the passing of that statute, under the circumstances of this case, be convicted on an indictment charging the offence of robbery. *Regina* v. *Henry*, 309

Indictments, Forms of.

[Those marked (*) were either held to be not good, or to be open to objection.]

1. For having a forged foreign note plate, 11

2. For forging a warrant for the payment of money (not setting it out), 41

3. For forging a request for the delivery of goods, 282, 423

4. For forging a deed (not setting it out), 427

5. For stealing and for destroying a will, 89

6. For concealing a will,* 89

7. For conspiring to excite discontent and disaffection, 91, 275, 277

8. For an unlawful assembly, 91

9. For an attempt to abuse a female child,* 215

10. For false pretences in ordering goods,* 227

11. For attempting to procure abortion by means of an instrument, 236
12. For obtaining money as a composition for forbearing to prosecute on a penal statute, 368
13. For forging a receipt as to a Chelsea pension, 408
14. For attempting to discharge loaded arms, 483
15. For manslaughter caused by negligently navigating a vessel, 672
16. For assaulting a gamekeeper, (on the stat. 9 Geo. 4, c. 69, s. 2,*) 730
17. Indictment for uttering counterfeit coin after a previous conviction, 757, n.
18. Averment of materiality on an indictment for perjury before Commissioners,* 786

INFORMATION.

See THREATENING TO LAY AN INFORMATION, AND OBTAINING MONEY THEREBY.

INJURIES BY RIOTERS.

See DEMOLISHING HOUSES.

INNKEEPER.

See LIEN.

INSANITY.

See PRACTICE.—TREASON, 25, 26.

INSOLVENT.

See BEGIN, RIGHT TO, 8.

1. If an insolvent debtor in his schedule describe a debt due by him to be for "drawing deeds," that will be taken to include not the mere drawing only, but also the stamps, journeys, taking instructions, and every thing else respecting them. *Lambert* v. *Hale*, 506

2. If an insolvent in his schedule state a debt due from him to be £10, and it be really £32, whether this misstatement, if arising from mistake, be aided by the 63rd section of the Insolvent Debtors' Act, 7 Geo. 4, c. 57—*Quære*. *Ibid.*

INSURANCE.

See LANDLORD AND TENANT, 9, 10.

INTENT.

See FORGERY, 8.—LIBEL, 6.

I. O. U.

See STAMP, 3.

JOINT CONTRACT.

See CONTRACT, 2.

JURORS.

See CHALLENGE.—TREASON, 9, 10, 11.

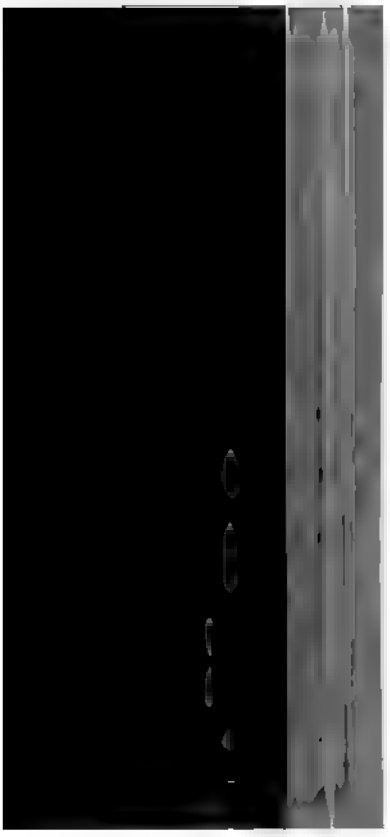
JURY.

See GRAND JURY.

LANDLORD AND TENANT.

See SHERIFF, 1, 2, 3.

1. A., himself a leaseholder of a house, entered into an agreement with B. to grant him an under-lease of the house for twenty years and a fraction, from Midsummer, 1836. B. entered into possession, and paid rent to A., and underlet a portion of the house to C. from Michaelmas, 1836, and received from C. the first quarter's rent, due at Christmas, 1836. On the 11th of January, 1837, B., wishing to part with his interest before the execution of the lease, wrote to A. requesting him to insert the name of D. instead of his. D., a few days after, sent to A. a written consent to become his tenant, on the same terms as B. had agreed to; and, in consequence, the lease was, on the 15th of March, 1837, granted by A. to D., instead of to B. D. brought an action for use and occupation against C., to whom B. had underlet a part of the house, and claimed the quarter's rent due at Lady-day, 1837:—*Held*, that he was entitled



was not liable to rent for the period between the time of the occurrence of the nuisance and that at which he quitted the premises. *Cowie* v. *Goodwin*, 378

3. A notice to quit "on Saint Michaelmas Day," is primâ facie a notice to quit at New Michaelmas; but if the holding be from Old Michaelmas, it will be a sufficient notice to quit at that time. *Doe* d. *Willis* v. *Perrin*, 467

4. A. being owner of a farm let it for seven years to B.; and by a written agreement of the same date it was agreed, that A. should manage the farm for B., allowing A. 12*s*. a week, "and allowing him and his family to reside and have the use of the dwelling-house and furniture therein, free of rent," and this agreement was to be put an end to by three months' notice or three months' wages:—*Held*, that this agreement did not require a lease stamp, as it did not contain a demise of the house, the occupation of it being a mere remuneration for services. *Doe* d. *Hughes* v. *Derry*, 494

5. *Held*, also, that no notice to quit was necessary, if the service was put an end to. *Ibid.*

6. In an action of covenant for non-repair of premises, held by the defendant under a lease which has several years to run, the proper measure of da-

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LARCENY.

See HORSE-STEALING.—HOUSE AND GOODS OF A CONVICTED FELON.—MARKET OVERT.—RECEIVERS, 3.

1. A. was indicted for embezzlement as clerk and servant to the prosecutor, and B. was charged as accessary. It appeared that A. was only employed as a town traveller and collector to go round and take orders from customers, and enter them in the books, and receive the money for the goods supplied in consequence; but he had no authority whatever to take or direct the delivery of goods from the shop. A customer having ordered two articles of A., he entered only one in the order book; but B., who was the prosecutor's carman, delivered both articles to the customer. An invoice was made out by the prosecutor for the first article, amounting to 6*s.* 6*d.*, and B. entered the second article at the bottom as 4*s.* 6*d.* A. afterwards received of the customer the whole of the 11*s.*, but only accounted to the prosecutor for the 6*s.* 6*d.*:—*Held*, that the offence committed was not embezzlement, but larceny. *Regina* v. *Wilson*, 27

2. A person who steals goods in France, cannot be tried in England for the offence, though he be found in possession of the stolen property there. *Regina* v. *Madge*, 29

3. If a person, *not being the servant* of the party who intrusts him, receive a parcel containing notes to take to a coach-office, and abstract the notes on his way there, and apply them to his own use, he is guilty of larceny. *Regina* v. *Jenkins*, 38

4. Where a person went into a shop for the purpose of purchasing a ruby pin, and after selecting one, which was put into a box, while the young man who was serving him was absent for a minute, took it out of the box and put it into his stock, and afterwards went into the shawl department of the shop to purchase other articles, saying that he would return and pay for both together, but was allowed to go away without inquiry being made as to whether he had paid in the shawl department, and a bill, including the price of the pin, was sent the next day to the house where he was residing:—*Held*, on the trial of the prisoner for stealing the pin, that, under these circumstances, it was for the jury to say whether there was any intention to steal the pin, and whether there was or was not credit given for it, and also that the prosecutors ought to have called the person who served in the shawl department, and that their not doing so was a circumstance which would justify the jury in looking with some suspicion at the case. *Regina* v. *Box*, 126

5. Though to make a thing the subject of an indictment for larceny, it must be of some value, and stated to be so in the indictment, yet it need not be of the value of some coin known to the law, that is to say, of a farthing at the least. *Regina* v. *Morris*, 349

6. If the owner of goods employ a person, not in his service, to take them to a particular place, shew them to a customer, and bring them back, without authorizing him to sell them to, or leave them with the customer, and he, instead of taking the goods to the specified place, sell them for his own advantage, he will be guilty of larceny, inasmuch as the felonious intent came upon him at a time when he had the custody only, and not the possession of the goods. *Regina* v. *Harvey*, 353

7. The defence to a charge of stealing, that the prisoner pledged the property, intending to redeem it and restore it, is a defence not to be generally encouraged; though, if clearly made out in proof, it may be allowed to prevail. The rule for the jury's guidance in such a case seems to be, that if it clearly appear that the prisoner only intended to raise money upon the property for a temporary purpose, and,

at the time of pledging the article, had a reasonable and fair expectation of being enabled shortly by the receipt of money to take it out and restore it, he ought to be acquitted, but otherwise not. *Regina* v. *Phetheon*, 552

8. A. was treating B. at a beer-house, and A. wishing to pay put down a sovereign desiring the landlady to give him change; she could not do so, and B. said that he would go out and get change. A. said "You won't come back with the change." B. replied, "Never fear." A. allowed B. to take up the sovereign, and B. never returned either with it or the change:—*Held*, no larceny, as A., having permitted the sovereign to be taken away for the purpose of being changed, he could never have expected to receive back the specific coin, and had therefore divested himself of the entire possession of it. *Regina* v. *Thomas*, 741

9. On an indictment for larceny it appeared that a landlord went to his tenant (who had removed all his goods) to demand rent amounting to 12*l.* 10*s.*, taking with him a receipt ready written and signed; the tenant gave him £2, and asked to look at the receipt. It was given to him, and he refused to return it or to pay the remainder of the rent. It was proved by the landlord that at the time he gave the prisoner the receipt, he thought the prisoner was going to pay him the rent; and that he should not have parted with the receipt unless he had been paid all the rent, but that when he put the receipt into the prisoner's hands he never expected to have the receipt again, and that he did not want the receipt again, but wanted his rent to be paid:—*Held*, a larceny, and that the fact of the tenant giving the £2 made no difference. *Regina* v. *Rodway*, 784

LARCENY IN A FOREIGN COUNTRY.

See LARCENY, 2.

LARCENY (BY A SERVANT).

If a servant take his master's property and hand it over to another as a gift, it is as much a felony as if he sell it or take it to a pawnbroker's and pledge it. *Regina* v. *White*, 344

LARCENY IN A SHOP.

A shop to be within the stat. 7 & 8 Geo. 4, c. 29, s. 15, and 1 Vict. 90, (as to breaking into shops), must be a shop for the sale of goods, and a mere workshop will not be sufficient. *Regina* v. *Sanders*, 79

LEASE.

See LANDLORD AND TENANT.

LENT GOODS.

See GOODS LENT.

LIBEL.

1. In an action for a libel upon a ship, imputing unseaworthiness, the plaintiff may give evidence of special damage, although he has not averred it in his declaration, because a libel upon a chattel is not actionable, unless the owner sustain some damage thereby. *Ingram* v. *Lawson*, 326

2. Where a libel was published in a newspaper on the 31st of October, and the plaintiff commenced his action on the 4th of November, it was *Held*, that in the estimate of damages the jury need not confine themselves to the damage which accrued between the publication and the bringing of the action. *Ibid.*

3. Every man has a right to give every public matter a candid, full, and free discussion; but although the people have a right to discuss any grievances they have to complain of, they must not do it in a way to excite tumult: and if a party publish a paper on any such matter, and it contain no more than a calm and quiet discussion, allowing something for a little feeling in men's minds, that will be no libel;

but if the paper go beyond that, and be calculated to excite tumult, it is a libel. *Regina* v. *Collins*, 456

4. A defendant was tried for publishing a letter, purporting to be the resolutions of a body of persons calling themselves the General Convention, and in one part of it stated that an outrage had been committed on the people of Birmingham by a force "acting under the authority of men who, when out of office, sanctioned and took part in the meetings of the people." A witness for the Crown stated in his cross-examination, that he had formerly belonged to the Convention, but had since resigned, and had become a town councillor of Birmingham. It was proposed to ask him further in cross-examination, as to what he said at a meeting at which the Convention was agreed on, but which took place nearly a year before the publication of the alleged libel:—*Held*, that this could not be done. *Ibid.*

5. If the manuscript of a libel be proved to be in the handwriting of the defendant, and it be also proved to have been printed and published, this is evidence to go to the jury that it was published by the defendant, although there be no evidence given to shew that the printing and publication were by the direction of the defendant. *Regina* v. *Lovett*, 462

6. If a paper, published by the defendant, has a direct tendency to cause unlawful meetings and disturbances, and to lead to a violation of the laws, it is a seditious libel; and with respect to the intent every one must be taken to intend the natural consequences of what he has done. *Ibid.*

7. A. and B. were separately indicted for publishing the same libel. Both indictments containing the same prefatory allegations. A. was tried first, and on the trial of B. such of the witnesses as had been also examined on the trial of A. had (by consent) their evidence read over to them from the Judge's notes, B. being allowed to further cross-examine them. *Ibid.*

8. In an action for a libel which imputed that the plaintiff's house was opened as a gaming-house, under the leadership of a woman of notorious character. The plaintiff alleged in his declaration that his house was a club-house, and that divers persons paid annual subscriptions. The payment of subscriptions was denied by one of the defendant's pleas, and evidence was given that a book was kept for subscribers' names, and that two gentlemen wrote their names in this book; but no evidence was given of the payment of any subscription:—*Held*, that there was evidence to go to the jury in support of the allegation in the declaration. The defendant pleaded several pleas, but none of them at all referring to the plaintiff's wife:—*Held*, that the plaintiff could not go into evidence to shew that his wife was a respectable person, as on these pleadings she must be taken to be so:—*Held*, also, that the plaintiff could not go into evidence to shew that his wife had become ill, and died soon after the publication of the libels. *Guy* v. *Gregory*, 584

9. In an action for a libel the declaration stated, that the defendant published a libel, "*contained in, and being an article in, a certain weekly printed publication, or paper, called the Paul Pry.*" At the trial it was proved that the defendant gave a printed slip of paper, which appeared to have been cut from the Paul Pry, to several persons for them to read, and that they read it:—*Held*, that the Judge at the trial might properly allow the record to be amended by striking out the above-mentioned allegation, that the libel was contained in, and was an article in, the Paul Pry. *Foster* v. *Pointer*, 718

10. The stat. 3 & 4 Vict. c. 24, applies to cases of libel, and therefore if in a case of libel nominal damages be given, and the Judge certifies that the grievance was wilful and malicious,

the plaintiff will be entitled to his costs. *Ibid.*

LIEN.

1. An innkeeper has no lien on a horse placed in his stable for the amount of its keep unless it be placed there by a guest. *Binns* v. *Pigott*, 208

2. If a person is stopped with a horse under suspicious circumstances, and the horse be placed at an inn by the police, the innkeeper has no lien on the horse for its keep; and if an auctioneer, by the direction of the innkeeper, sell the horse for its keep, he is liable to be sued in trover by the owner of the horse. *Ibid.*

LIMITATIONS.

1. The acknowledgment in writing to take a case out of the Statute of Limitations must either amount to a distinct promise to pay, or to a distinct acknowledgment that the sum is due. *Bucket* v. *Church*, 209

2. *Semble*, that there is some doubt whether it is a question for the Judge or for the jury to determine, whether a letter written by the defendant be or be not a sufficient acknowledgment for this purpose; and till that point is settled, the learned Judge will, to save the parties expense, express his own opinion with respect to the document, and also leave it to the jury. *Ibid.*

LOADED ARMS, ATTEMPTING TO DISCHARGE.

See ATTEMPTING TO DISCHARGE LOADED ARMS.

LUNATIC.

See PRACTICE.—TREASON, 25, 26.

MAINTENANCE.

See CHILDREN.

MANSLAUGHTER.

See MURDER.—SHOOTING.

1. The killing of a man on the highway is not justifiable homicide, unless there was an intention on the part of the person killed to rob or murder, or do some dreadful bodily injury to the person killing; or, in other words, the conduct of the party must be such as to render it *necessary*, on the part of the party killing, to do the act in self-defence. *Regina* v. *Bull*, 22

2. All struggles in anger, whether by fighting or wrestling, or any other mode, are unlawful, and death occasioned by them is manslaughter at least. *Regina* v. *Canniff*, 359

3. Those who navigate the river Thames improperly, either by too much speed or by negligent conduct, are as much liable, if death ensues, as those who cause it on a public highway on land, either by furious driving or by negligent conduct. *Regina* v. *Taylor*, 672

4. In a case of manslaughter, it is the duty of the coroner to bind over all those witnesses who prove any material fact against the party accused, and not those who are called for the purpose of exculpating him. *Ibid.*

5. However, if the coroner bind over all the witnesses on both sides, no blame is imputable to the clerk of indictments if he require them all to be put on the back of the bill, and examined before the grand jury. *Ibid.*

6. A prisoner who is tried for manslaughter on the coroner's inquisition may be convicted of an assault under the 11th sect. of the stat. 1 Vict. c. 85. *Regina* v. *Pool*, 728

MARKET OVERT.

A sale of goods, being those in which he usually deals, made to a tradesman in his warehouse or shop, in the city of London, is a sale in market overt, notwithstanding the construction of the premises be such, that a person from the outside cannot see what is going on within. *Lyons* v. *De Pass*, 68

MARRIAGE.

See BIGAMY, 1, 2.

MASTER AND SERVANT.

See APPRENTICE.—CARPENTER.—NEGLIGENCE.

MEETING, PUBLIC.

See CONSPIRACY.—IMPRISONMENT, 1.—UNLAWFUL ASSEMBLY.

MINING-ENGINES, DESTROYING.

1. The bottom of the shaft of a mine had water in it, and the owner of the mine had caused a scaffold to be erected at some distance above the bottom of the mine, for the purpose of working a vein of coal which was on a level with the scaffold:—*Held*, that this scaffold was an "erection used in conducting the business" of a "mine," within the stat. 7 & 8 Geo. 4, c. 30, s. 7, and that the damaging it with intent to destroy it, or to render it useless, was felony. *Regina* v. *Whittingham*, 234

2. A coal-mine was worked by a steam-engine which caused a cylinder called a drum to revolve and take up the rope as the coal was drawn up from the mine:—*Held*, that proof of damaging the drum would not support an indictment which charged the damaging of a steam-engine used in working a mine. *Ibid.*

3. A steam-engine used in draining and working a mine, had been stopped and locked up for the night. The prisoner got into the engine-house and set it going, and there being no machinery attached, the engine went with great velocity, and received damage:—*Held*, that this was a damaging of the engine within the stat. 7 & 8 Geo. 4, c. 30, s. 7. *Regina* v. *Norris*, 241

MISDEMEANOR.

Every attempt (not every intention, but every attempt) to commit a misdemeanor is a misdemeanor. *Regina* v. *Martin*, 215

MONEY FOUND ON A PRISONER.

See TREASON, 3.

MONEY HAD AND RECEIVED.

See ATTORNEY, 1.—WITNESS, 5.

MURDER.

See BURGLARY WITH VIOLENCE.—DYING DECLARATION.——MANSLAUGHTER.—PRINCIPALS IN FELONY.—SHOOTING.—SPECIAL CONSTABLE.—SUICIDE.

1. If a child be killed after it has wholly come forth from the body of the mother, but is still connected with her by means of the umbilical cord, it seems that such killing will be murder. *Regina* v. *Reeves*, 25

2. On a trial for murder, the deposition on oath of the prisoner, taken before the coroner, on the inquest held on the body of the deceased, is not receivable in evidence. *Regina* v. *Owen*, 238

3. A prisoner was indicted for the murder of her infant child by poison. It appeared that she purchased a bottle of laudanum, and directed the person who had the care of the child to give it a tea-spoonful every night. That person did not do so, but put the bottle on the mantel-piece, where another little child found it, and gave part of the contents to the prisoner's child, who soon after died:—*Held*, that the administering of the laudanum by the child was, under all the circumstances of the case, as much, in point of law, an administering by the prisoner, as if she had herself actually administered it with her own hand. *Regina* v. *Michael*, 356

4. On a charge of child murder, it appeared that the child must have died before it had an independent circulation:—*Held*, that as the child had never had an independent circulation, the charge of murder could not be sustained. *Regina* v. *Wright*, 754

plaintiff, by his negligence or improper conduct, substantially contributed to the occurrence of the injury of which he complains; *not* to the *amount* of it, but to its occurrence. Therefore, where a brig was carrying the anchor in a position contrary to the by-laws of the River Thames, at the time when she came in collision with a barge, it was *Held*, that the improper carrying of the anchor would not of itself be sufficient to make the owner of the brig responsible in damages, if the barge, by departing from the known rule of the river, brought herself into the situation in which the brig struck her, although but for the position of the anchor the collision would not have produced the injury complained of. *Sills* v. *Brown*, 601

2. The deposition of a witness taken before the coroner on an inquiry touching the death of a person killed by the collision, is receivable in evidence in the action for damages, if the witness be shewn to be beyond the sea, *Ibid.*

3. A nautical witness cannot be asked whether he thinks, having heard the evidence in the cause, that the conduct of the captain was correct or not. *Ibid.*

4. Evidence of a practice in contravention of a by-law is not receivable.

mages: — *Held*, that the defendant could not go into evidence to shew that his cow had not killed the plaintiff's cow, as the contrary was admitted by the defendant's plea. *Lloyd* v. *Walkey*, 771

NEW TRIAL.

See BEGIN, RIGHT TO, 12.

NON-PAROCHIAL REGISTERS.

1. A list of the non-parochial registers which have been made evidence under the stat. 3 & 4 Vict. c. 92. 793

2. Mode of giving those registers and extracts from them in evidence, in the Courts of Common Law, and at the Sessions. *Ibid.*

3. Places of deposit of the registers of the Jews, the India registers, and the registers of British Embassies and factories abroad. *Ibid.*

NOTE, FORGED FOREIGN PLATE.

See FORGERY, 1.

NOTICE OF ACTION.

See POUND-KEEPER, 1—3.

A private person, who gives another into custody on a charge of having committed an offence against the stat. 7 & 8 Geo. 4, c. 29, (the Larceny Consolidation Act), is not entitled to notice of action under the 75th section of that act, as that section only applies to constables and other officers, and persons of that kind. *Brooker* v. *Field*, 651

NOTICE OF TRIAL.

See TRAVERSE, 1.

NOTICE TO PRODUCE.

1. A notice to produce a letter from the defendant to the plaintiff, was served on the plaintiff's attorney at a quarter before nine on the night before the trial. It was a letter on the subject of the promissory note on which the action was brought, and was an answer to a letter from the plaintiff to the defendant on the same subject:—*Held*, that the notice to produce was served too late. *Holt* v. *Miers*, 191

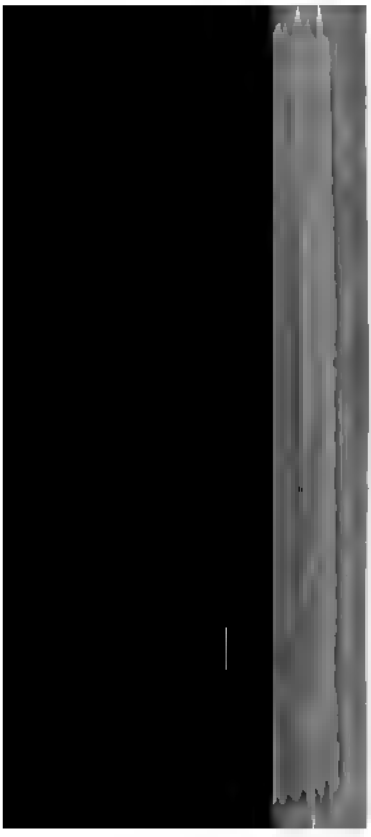
2. A cause was tried at the assizes on a Monday, the commission-day being on the Thursday before. A paper was called for under a notice to produce, which was served on the Saturday before the trial. The attorney on whom the notice to produce was served, and also the party who was his client, lived in the assize town:—*Held*, that the service of the notice to produce was not too late, and that the question in such cases is, whether, under all the circumstances, reasonable notice has been given. *Firkin* v. *Edwards*, 478

3. In a town cause, a notice to produce a paper that would be in the hands of the opposite attorney, was served at 8 p. m. on the evening before the trial, at his office, on one of his clerks, who had the management of the cause:—*Held*, that the service was not too late, and the paper not being produced, secondary evidence was given of its contents. *Gibbons* v. *Powell*, 634

4. Where none of the parties lived in the assize town, the plaintiff's attorney served the defendant's attorney in the assize town, on the commission day, with notice to produce a paper, and offered the expenses of going to fetch it. The defendant's attorney said, that that was of no use, as the paper was not in existence:—*Held*, that the plaintiff on the trial might give secondary evidence of the contents of the paper, as the statement of the defendant's attorney, that the paper was not in existence, got rid of any objections as to the lateness of the service of the notice to produce. *Foster* v. *Pointer*, 718

NOTICE TO QUIT.

See LANDLORD AND TENANT, 3, 5, 11.



was not liable to rent for the period between the time of the occurrence of the nuisance and that at which he quitted the premises. *Cowie* v. *Goodwin*, 378

OPENING SPEECH.
See COUNSEL.

ORDER OF COURT OF CHANCERY.
See EVIDENCE, 8.

PARENT AND CHILD.
See CHILDREN.

PARISH.
A house is properly described as "in the parish of Birmingham," although, for certain ecclesiastical purposes that parish is divided into three divisions, each called a parish. *Regina* v. *Howell*, 437

PARISH HOUSE.
See EJECTMENT, 4, 5.

PARTICULARS OF DEMAND.
A., a broker, introduced a merchant and a ship-owner together to treat for a charter-party: they finally made the

error:—*Held*, that the reversal of the judgment against B. was no ground of defence for A., as shewing that his evidence could not have been material, and that it did not negative the allegation that B. had been convicted. *Regina* v. *Meek*, 513

2. On a charge of perjury, alleged to have been committed before commissioners to examine witnesses in a Chancery suit, the indictment stated that the four commissioners were commanded to examine the witnesses. Their commission was put in, and by it the commissioners, *or any three or two of them*, were commanded to examine the witnesses:—*Held*, a fatal variance, and the Judge would not allow it to be amended under the stat. 9 Geo. 4, c. 15. *Regina* v. *Hewins*, 786

3. Amendments in criminal cases should be made very sparingly; one objection to amending an indictment being, that it is an alteration of a presentment on the oath of the Grand Jury. *Ibid.*

4. The Judges are unwilling to allow the amendment of variances, which might have been avoided by ordinary care. *Ibid.*

5. In an indictment for perjury, charged to have been committed before commissioners to examine witnesses in a Chancery suit, it was alleged that a suit was depending, and that a commission was issued for the examination of witnesses, and that interrogatories were exhibited (the 9th of which was set out); and it was averred that "upon the examination of the said J. H. [the defendant] upon the said interrogatories, it became and was material to ascertain the truth of the matters hereinafter alleged to have been sworn to, and stated by the said J. H. upon his oath, in answer to the said 9th interrogatory."—Whether this is a sufficient averment of materiality—*Quære?* *Ibid.*

PLATE, FORGED NOTE.

See FORGERY 1, 9.

PLEA DEMURRED TO.

Where a special plea has been demurred to, the defendant's counsel has no right at the trial to allude to the statements in it in his address to the jury. *Ingram* v. *Lawson*, 326

PLEA IN FELONY.

1. A. was indicted for felony in using an instrument to procure abortion, and B. was indicted with him as an accessary before the fact. A. did not appear to take his trial, but B., who was on bail, appeared.

Held, that, under these circumstances, B. was not compellable to plead to the indictment, and the Judge allowed B. to be admitted to bail. *Regina* v. *Ashmall*, 236

2. A prisoner who has pleaded guilty to a charge of larceny, and upon whom sentence has been passed, cannot afterwards be allowed to retract his plea, and plead not guilty. *Regina* v. *Sell*, 346

PLEADING.

See BANKRUPT, 1, 2.—DEMURRAGE.—IMPRISONMENT, 3.—NEGLIGENCE, 8.—PATENT, 1, 3.

1. Where a plaintiff sues on a quantum meruit for work and labour, the defendant may (without pleading a set-off) give in evidence, that he provided the plaintiff's men, who did the work, with their beer, as it may be that the plaintiff deserves to be paid the less, because his men had their beer provided for them by the defendant. *Grainger* v. *Raybould*, 356

2. If a defendant plead not guilty "by statute" to the declaration, that plea also extends to a new assignment. *Mason* v. *Newland*, 575

3. If a defendant does not add the

venue be in a wrong county, this is not aided by the defendant having omitted to add the words "by statute" on the margin of his plea. *Mason* v. *Newland*, 575

4. A plaintiff declared specially in assumpsit, that in consideration that the plaintiff had sold and delivered twenty tons of best Dutch lead to the defendant, the latter had promised to deliver to the plaintiff prussiate of potash to the same amount, and the plaintiff averred the delivery of the twenty tons of best Dutch lead, and stated as a breach that the defendant would not deliver the full quantity of potash. The defendant pleaded non assumpsit:—*Held*, that as the defendant had not pleaded that the plaintiff had not delivered best Dutch lead, he could not go into evidence to shew that the lead was of inferior quality. *Pegg* v. *Stead*, 636

5. On a count for a quantum valebant the plaintiff may give evidence of an agreed price for the goods, and the defendant on a plea of non assumpsit may in such a case also go into evidence to induce the jury not to give that price, by shewing that the articles delivered were inferior to those that the price was agreed to be paid for. *Ibid.*

6. In an action by a banker as indorsee against his customer as accep-

another carriage, from which goods fell on the shafts of a gig and broke them, 629

15. Declaration against a bailee for reward for loss of the goods from negligence, 632

16. Plea thereto by the bailee, that he did not receive the goods to be kept for reward, 632, n.

17. Declaration in special assumpsit, for not delivering prussiate of potash in exchange for Dutch lead, 636

18. Plea to a declaration on a bill of exchange, that the holder agreed not to enforce payment in consideration of the defendant giving up his claim on another person, 686

19. Declaration for not properly securing a cow in a slaughter-house, in consequence of which another cow was killed, 771

20. Statement of future damage, in consequence of an injury done to the plaintiff's apprentice, 63

21. Statement of special damage to a dissenting minister, by his being dismissed from his situation in consequence of slanderous words, 766

For the forms of indictment, see *Indictment, Forms of*.

PLEAS.

Certificate for costs under the stat. 4 Anne, c. 16, s. 5. *Read* v. *Thoyts*, 515

POACHING.

See ASSAULTING A GAMEKEEPER.

POISON, ADMINISTERING.

See MURDER, 3.

POLICEMAN, ASSAULTING.

See ASSAULT, 9.

POOR.

See EJECTMENT, 4, 5.

POSSESSION, ADVERSE.

See EJECTMENT, 3, 7.

POSTPONING TRIAL.

1. *Semble*, that where there are several indictments against prisoners, on all of which they have *been arraigned*, the prosecutor having *tried* some of the indictments, and *failed* in obtaining a conviction, ought not to be allowed to postpone the trial of the remaining cases till the next session. *Regina* v. *Fuller*, 35

2. Three prisoners were charged with rape and murder, and being acquitted of the rape, the counsel for the prosecution moved to put off the trial for the murder till it could be ascertained whether the Crown would pardon a person convicted of bigamy, to whom it was alleged that one of the prisoners had made an important statement. The Judge postponed the trial, and would not admit the prisoners to bail. *Regina* v. *Owen*, 83

3. A true bill was found against several prisoners for a rape. The prisoners had been on bail, and the prosecutrix did not appear either before the grand jury, or to give evidence on the trial; and an application being made to the Judge to postpone the trial, founded on affidavit, stating, that, in the belief of the deponent, the prosecutrix was kept out of the way in consequence of money having been given to her by some of the prisoners, the Judge postponed the trial, and would not admit the prisoners to bail. *Regina* v. *Guttridge*, 228

4. A. had been committed for more than twenty days on a charge of riot. At the assizes he was indicted for feloniously demolishing a house: A.'s counsel applied to postpone the trial, and to have a statement of the evidence of several witnesses, whose names were on the back of the indictment, but who were not examined before the magistrates. The Judge postponed the trial till the next day, and held that the pri-

soner was only entitled to a copy of the depositions taken before the magistrates. *Regina* v. *Howell*, 437

5. B. had been committed for less than twenty days on a charge of riot, and was indicted for felonious demolition. His counsel stated that he had intended to traverse, and was wholly unprepared to try. The Judge postponed the trial for two days, and would not postpone the trial till the next assizes, as the general nature of the charge was not so different that the prisoner must be taken to be wholly ignorant of it. *Ibid.*

6. Before the Spring Assizes, 1840, A. was committed to take his trial for robbing and shooting B. at those assizes. The trial was postponed to the Summer Assizes, on the ground, that B. was too ill from his wounds to be able to attend to give evidence. Before the Summer Assizes B. died, and at those assizes a true bill for the murder of B. was found against A., and application was made on the part of the prosecution to postpone the trial to the next Spring Assizes, on the ground of the illness of a material witness. The Judge granted the application, and held that A. was not entitled to his discharge under the 7th section of the Habeas Corpus Act. *Regina* v. *Bowen*, 509

POUND-KEEPER.

1. A mare was distrained, damage feasant, by A., and detained in the pound by the pound-keeper B. for several days. B. supplied the mare with food while in the pound, and A. & B. joined in selling the mare for the keep:—*Held*, in an action of trover by the owner of the mare against A. & B., that if they bonâ fide and honestly *intended* to sell the mare under the provisions of the stat. 5 & 6 Will. 4, c. 59, s. 4, (the cruelty to animals' act), they were entitled to notice of action, and to have the venue laid in the proper county; but on these facts the Judge would not nonsuit, but left it to the jury to say whether the defendants meant bonâ fide to act upon the provisions of that statute, and that if they did the defendants were entitled to their verdict. *Mason* v. *Newland*. 575

2. If a defendant plead not guilty "by statute" to the declaration, that plea also extends to a new assignment. *Ibid.*

3. If a defendant does not add the words "by statute" on the margin of his plea of not guilty, he cannot give special matter in evidence to bring himself within an act of Parliament, which allows a plea of not guilty; but if at the end of the plaintiff's case it appear that the defendant was entitled to notice of action, and to have the venue laid in the proper county, and the plaintiff gave no notice of action, and the venue be in a wrong county, this is not aided by the defendant having omitted to add the words "by statute" on the margin of his plea. *Ibid.*

4. *Semble*, that under the 4th section of the stat. 5 & 6 Will. 4, c. 59, the person who is bound to supply food to impounded cattle is the distrainer or person at whose suit they are impounded, and not the pound-keeper; but if the pound-keeper supplies the food at the request of the distrainer, or the distrainer joins with the pound-keeper in a subsequent sale of the cattle under this act, the pound-keeper and the distrainer are for this purpose to be considered as one. *Ibid.*

5. *Semble*, that the 4th section of this statute excludes any right in the owner of the cattle to supply them with food while in the pound. Under the provisions of this statute the distrainer who supplies the food, may either apply to a magistrate to allow any sum not exceeding double the value of the food, or may sell the cattle; but no magistrate ought to allow more than the actual value of the food,

if the owner of the cattle was willing to supply the food himself. *Ibid.*

6. If cattle be sold under this provision of the stat. 5 & 6 Will. 4, c. 59, the distrainer can only get the single value of the food and not the amount of the damage for which the cattle were distrained, as all the overplus beyond the value of the food, and the expenses of the sale, is to be returned to the owner of the cattle. *Ibid.*

7. The 5th section of the stat. 5 & 6 Will. 4, c. 59, does not give any person a right to any payment; it merely allows charitable persons to supply food to impounded cattle without being liable to an action for doing so. *Ibid.*

8. Forms of pleas by a person causing cattle to be impounded, and by the pound-keeper. *Ibid.*

POWER OF ATTORNEY.

See EVIDENCE, 2, 3.

PRACTICE.

See BEGIN, RIGHT TO.—COUNSEL.—EJECTMENT, 1, 2.—EXAMINATION OF WITNESSES.—NOTICE TO PRODUCE.—POSTPONING TRIAL.—TREASON.—TRIAL.—WITNESS, 1.

A man was indicted for shooting at his wife with intent to murder her, &c. Previous to the commencement of his trial, he applied to the Judge to know whether his wife was to be produced as a witness for the prosecution, stating that her presence was necessary for his interests: the counsel for the prosecution stated that he should not call her; and the Judge told the prisoner that, although she was a competent witness against him, yet her presence was not indispensable. The prisoner was defended by counsel, who set up for him the defence of insanity. The prisoner, however, objected to such a defence, asserting that he was not insane; and he was allowed by the Judge to suggest questions to be put by his Lordship to the witnesses for the prosecution to negative the supposition that he was insane; and his Lordship also, at the request of the prisoner, allowed additional witnesses to be called on his behalf for the same purpose. They, however, failed in shewing that the defence was an incorrect one, and, on the contrary, their evidence tended to establish it more clearly, and the prisoner was acquitted on the ground of insanity. *Regina* v. *Pearce*, 667

PRECEDENCE OF SERJEANTS AT LAW, 371, n. (*a*)

PRETENCES.

See FALSE PRETENCES.

PREVIOUS CONVICTION.

In order to prove the identity of a prisoner who is named in a certificate of a previous conviction, it is not necessary to call a witness who was present at the trial to which the certificate relates: it is sufficient to prove that the prisoner is the person who underwent the sentence mentioned in the certificate. *Regina* v. *Crofts*, 219

PRINCIPAL AND ACCESSARY.

See ACCESSARY AFTER THE FACT.—ACCESSARY BEFORE THE FACT.—PRINCIPALS IN FELONY.—RECEIVERS.

PRINCIPAL AND AGENT.

See AGENT'S COMMISSION.

PRINCIPALS IN FELONY.

1. All those who assemble themselves together with an intent even to commit a trespass, the execution whereof causes a felony to be committed, and continue together abetting one another till they have actually put their design into execution, and

also all those who are present when a felony is committed, and abet the doing of it, are principals in the felony. *Regina* v. *Howell*, 437

2. Where persons combine to stand by one another in a breach of the peace, with a general resolution to resist all opposers, and in the execution of their design a murder is commited, all of the company are equally principals in the murder, though at the time of the fact some of them were at such a distance as to be out of view. *Ibid.*

PROMOTIONS.

188, 371, 717.

PUBLIC MEETING.

See CONSPIRACY.—IMPRISONMENT.—UNLAWFUL ASSEMBLY.

PURCHASER.

See EJECTMENT, 3.

QUAKER.

See GRAND JURY, 2.

QUANTUM MERUIT.

See PLEADING, 1.

QUANTUM VALEBANT.

See PLEADING, 4, 5.

QUARTER SESSIONS.

Where the Quarter Sessions of a county occur while the Judge of Assize is proceeding with the trial of prisoners in that county after the grand jury at the assizes have been discharged, the better course is for the Quarter Sessions not to proceed with the trial of any prisoners, but to dispose of all their other business, and then to adjourn to a future day. 792

QUEEN'S COUNSEL.

See COUNSEL, 4.

QUIT, NOTICE TO.

See LANDLORD AND TENANT, 3, 5, 11.

RAILWAY.

See COMPANY.

RAPE.

See ABUSING FEMALE CHILDREN.—ASSAULT.—REPLY.

1. In a case of rape, since the passing of the statute 9 Geo. 4, c. 31, s. 18, the *only* question for the jury is, whether the private parts of the man did or did not enter into the person of the woman; and the reason for the limitation to that single inquiry seems to be, that it was thought that the law was holding itself up to contempt by having the subtle and critical subjects of emission, &c., discussed before Judges and juries. Therefore, though it appear from the evidence, beyond all possibility of doubt, that the party was disturbed immediately after penetration, and before the completion of his purpose, yet he must be found guilty of having committed the complete offence of rape. *Regina* v. *Allen*, 31

2. A boy under 14 years of age cannot, by law, be convicted of feloniously carnally knowing and abusing a girl under ten years old, even though it be proved that he has arrived at the full state of puberty. *Regina* v. *Jordan*, 118

3. To constitute penetration on a charge of this offence, the parts of the male must be inserted in those of the female; *but, as matter of law*, it is not essential that the hymen should be ruptured. *Ibid.*

4. In a case of rape, if there has been penetration, the jury ought to convict of the capital offence, even though the penetration has not proceeded to the rupture of the hymen. *Regina* v. *Hughes*, 752

5. If on a trial of an indictment for a rape, it appear that the prisoner was

under 14 years of age at the time he committed the offence, he must be acquitted of the rape, but the jury may convict him of an assault under the stat. 1 Vict. c. 85, s. 11. *Regina* v. *Brimilow*, 366

6. On the trial of an indictment for a rape, it appeared that the person alleged to have been ravished, (but who was since dead), had come home evidently suffering from recent violence. It was proved that on her return home she made a statement as to the injury she had received, and named the persons who had committed it:—*Held*, that the particulars of this statement could not be given in evidence, as independent evidence, to shew who were the persons who committed the offence, and that statements of this kind were only admissible to confirm the evidence of the prosecutrix, by shewing that she made a recent complaint of the injury she had received. *Regina* v. *Megson*, 420

7. In a case of rape, if it were proved on the part of the prosecution that the party alleged to have been ravished has been kept out of the way by the prisoner, the Judge would allow her deposition before the magistrate to be given in evidence; but where that was not proved, and the prosecutrix was not at the trial, evidence of complaints made by her recently after the outrage was rejected, as such evidence is received as confirmatory evidence only. *Regina* v. *Guttridges*, 471

8. A prisoner was convicted on an indictment for a rape, which charged that the prisoner, "in and upon E. F.," "feloniously and violently did make [omitting the words 'an assault,'] and her, the said E. F., then and there and against her will violently and feloniously did ravish and carnally know; against the form of the statute, &c.:—*Held*, that the omission of the words "an assault," was no ground for arresting the judgment. *Regina* v. *Allen*, 521

9. If in a case of rape the jury are satisfied that non-resistance on the part of the prosecutrix proceeded merely from her being overpowered by actual force, or from her not being able from want of strength to resist any longer, or that from the number of persons attacking her she considered resistance dangerous and absolutely useless, the jury ought to convict the prisoner of the capital charge; but if they think from the whole of the circumstances that, although when the prosecutrix was first laid hold of it was against her will, yet that she did not resist afterwards because she in some degree consented to what was afterwards done to her, they ought to acquit the prisoners of the capital charge, and convict them of an assault only. *Regina* v. *Hallett*, 748

10. A witness at the trial gave evidence which was different from her deposition before the magistrate. The deposition was signed by a mark, which she denied to be hers. Neither the magistrate nor his clerk were at the trial; but a constable proved that he was at the examination, and heard her deposition read over to her, and saw her with a pen in her hand, but did not see her make her mark. He also proved the magistrate's signature, and after reading the deposition (which preceded his own which he had signed) he stated that he believed that that was the deposition which was read over to the witness:—*Held*, that this deposition might be read to the witness by the officer of the Court for the Judge to examine her upon it. *Ibid.*

REASONABLE TIME.

See GUARANTEE.

RECEIPT.

See CHELSEA PENSION.—STAMP, 1.

RECEIVERS.

1. Three persons were charged with

a larceny, and two others as accessaries in separately receiving portions of the stolen goods. The indictment also contained two other counts, one of them charging each of the receivers separately with a substantive felony in separately receiving a portion of the stolen goods. The principals were acquitted:—*Held*, that the receivers might be convicted on the last two counts of the indictment. *Regina* v. *Pulham*, 280

2. An indictment stated that *a certain evil-disposed person stole* certain goods; that L. C. *incited* him to do so; that E. C. did the same; that E. M. *received* a portion of the property knowing it to have been stolen; it also charged A. A. and the beforementioned E. C. as receivers. All the prisoners having been found guilty by the jury, the conviction was held good against all except L. C. who was merely charged as accessary before the fact, and judgment was given upon the charges of receiving only. *Regina* v. *Caspar*, 289

3. An ostler assisted in removing from a waggon, which stopped at the inn where he was employed, a quantity of hay which had been taken by the waggoner from his master's stables and put into the waggon, *such hay not being allowed for the horses on the journey*:—*Held*, that the ostler was properly indicted for *receiving*, because, as the hay was not allowed by the master for the horses, the moment it was removed by the waggoner from the stable to the waggon animo furandi, the larceny was complete. *Regina* v. *Gruncell*, 365

REGISTERS.

See NON-PAROCHIAL REGISTERS.

REPAIR.

See LANDLORD AND TENANT, 6, 8.

REPLY.

See EJECTMENT, 2.

A. was charged with feloniously carnally knowing and abusing a girl under ten. B. was charged with being present, aiding and abetting. A.'s counsel called no witnesses. B., who had no counsel, called a witness to prove an alibi for A.:—*Held*, that this evidence was in effect evidence for A., and that in strictness the counsel for the prosecution had a right to reply on the whole case, but that it was summum jus, and ought to be exercised with great forbearance. *Regina* v. *Jordan*, 118

RETRACTING PLEA.

See PLEAS IN FELONY, 3.

RIOT.

See CONSPIRACY.—DEMOLISHING HOUSES.—UNLAWFUL ASSEMBLY.—TREASON, 1.

RIOTERS, DEMOLITION OF HOUSES BY.

See DEMOLISHING HOUSES.

ROBBERY.

A. & B. were indicted for the offence of robbery. The jury found that A. took the property of the prosecutor from him by violence, and that B. was present during part of the time, and that he was a party with A. to a design to bring the prosecutor to the place where he was robbed by A., and to obtain property from him on a false charge of an unnatural crime, but that he was not aiding or assisting in or privy to the taking of the property from the prosecutor by violence:—*Held*, by all the Judges, that in order to convict B., the indictment should have been framed on the stat. 1 Vict. c. 87, s. 4, and that he could not since the passing of that statute, under the circumstances of this case, be convicted on an indictment charging the offence of robbery. *Regina* v. *Henry*, 309

ROMAN CATHOLIC MARRIAGE.

See BIGAMY, 1, 2.

SCHOOL.

In an action for a quarter's salary, for taking away a child from a school without a quarter's notice, evidence was given on the part of the plaintiff, that a prospectus was given to the defendant when he came to inquire the terms of the school, and that it was usual to send a prospectus of the terms of the school with each child who went home for the holidays; and it was proposed, on the part of the defendant, to call a witness to prove that she had taken her children from the plaintiff's school without notice, and without being called on for the quarter's salary: —*Held*, that this evidence was not admissible; but that the witness might be asked, whether she had ever received any prospectus when her children came home for the holidays. *Delamotte* v. *Lane*, 261

SECONDARY EVIDENCE.

See EVIDENCE, 1, 2, 3.—NOTICE TO PRODUCE.

SECRETING A WILL.

See WILL, SECRETING.

SEDITIOUS LIBEL.

See LIBEL, 3, 4.

SERJEANTS AT LAW, PRECEDENCE OF, 371 (*n*).

SERVANT.

See APPRENTICE, 1.—CARPENTER.—CONTRACT, 1.—NEGLIGENCE.

SERVICES.

See CONTRACT, 1.

SET-OFF.

See PLEADING, 1, 6.

SHAREHOLDER.

See COMPANY.—WITNESS, 4

SHERIFF.

See BILL OF SALE.

1. In an action against a sheriff for removing goods taken under a fi. fa. without paying a year's rent, which was due to the landlord, the tenant against whom the execution issued is a competent witness for the plaintiff. *Read* v. *Thoyts*, 515

2. In such an action the defendant pleaded that no rent was in arrear, and that the sheriff had no notice that any rent was in arrear, thus admitting the execution and the taking by the defendant. It was proved that the goods were actually taken by M., and had never been taken except on that occasion:—*Held*, that as there had been no other seizure, this sufficiently shewed M. to have acted by the authority of the defendant, without proof of any warrant. *Ibid.*

3. In such an action there was in addition to the special count, a count in trover to which the defendant pleaded not guilty, and that the plaintiff was not possessed: and the plaintiff in addition to the proof that a year's rent was due, gave in evidence an absolute bill of sale, by which the tenant, before any rent had become due, assigned all his goods (including those taken in the fi. fa.) to the plaintiff for a debt, the tenant remaining in possession of the goods:—*Held*, that there being no evidence on the latter count to connect the sheriff with the taking of the goods, the plaintiff must fail on that count; but that if the jury thought the bill of sale void, as against the execution creditor, they might find for the plaintiff on the first count for the amount of the

year's rent; and the jury having found for the plaintiff on the first count, and for the defendant on the second count, the Judge would not certify under the stat. 4 Anne, c. 16, s. 5, to exempt the defendant from costs on the pleas pleaded by him to the first count of the declaration. *Ibid.*

SHIPPING.

See DEMURRAGE.

1. *Semble*, that the broker's commission on the freight of ships is five per cent., unless there be a special agreement on the ship he chartered upon a tender. *Brown* v. *Nairne*, 204

2. The usage is when a broker has introduced the captain of a ship and a merchant together, and they by his means enter into some negotiation as to the intended voyage, the broker is entitled to commission if a charter-party is effected between them for that voyage, even though they may employ another broker to prepare the charter-party, or may write the charter-party themselves. *Burnett* v. *Bouch*, 620

3. If a broker be authorized by both parties, and acting as the agent of each, communicates to the merchant what the ship-owner charges, and also communicates to the ship-owner what the merchant will give, and he names the ship and the parties so as to identify the transaction, and a charter-party be ultimately effected for that voyage, this broker is entitled to his commission; but if he does not mention the names so as to identify the transaction he does not get his commission to the exclusion of another broker, who afterwards introduces the parties personally to each other. *Ibid.*

4. A., a broker, introduced a merchant and a ship-owner together to treat for a charter-party; they finally made the charter-party through B., another broker. In an action by A. for his commission, the particulars of demand were "for commission due to the plaintiff for *procuring* a charter for a vessel called the W.:"—*Held*, sufficient. *Ibid.*

5. In an action for a libel upon a ship imputing unseaworthiness, the plaintiff may give evidence of special damage, although he has not avowed it in his declaration, because a libel upon a chattel is not actionable, unless the owner sustain some damage thereby. *Ingram* v. *Lawson*, 326

6. Where a libel was published in a newspaper on the 31st of October, and the plaintiff commenced his action on the 4th of November, it was *Held*, that in the estimate of damages the jury need not confine themselves to the damage which accrued between the publication and the bringing of the action. *Ibid.*

7. In an action against the proprietors of a steam vessel, to recover compensation for damage done to goods sent by them as carriers, if, on the whole, it be left in doubt what the cause of the injury was, or, if it may as well be attributable to perils of the seas as to negligence, the plaintiff cannot recover;—but if the perils of the seas required that more care should be used in the stowing of the goods on board than was bestowed on them, that will be negligence, for which the owners of the vessel will be answerable. *Muddle* v. *Stride*, 380

8. *Whether*, in such a case, on the arrival, and detention by foul weather, of the vessel at a place from which the goods could be conveyed by land to their destination, the captain of the vessel is bound to give notice to the consignee of the fact, to enable him, if he think proper, to obtain the goods earlier by sending for them—*Quære*. *Ibid.*

9. The question in what is called a running down case is, whether the plaintiff by his negligence or improper conduct substantially contributed to the occurrence of the injury of which he complains, *not* to the *amount* of it, but to its occurrence. Therefore, where a brig was carrying the anchor in a posi-

tion contrary to the by-laws of the river Thames, at the time when she came in collision with a barge, it was *Held* that the improper carrying of the anchor would not of itself be sufficient to make the owner of the brig responsible in damages, if the barge, by departing from the known rule of the river, brought herself into the situation in which the brig struck her, although but for the position of the anchor the collision would not have produced the injury complained of. *Sills* v. *Brown*, 601

10. The deposition of a witness taken before the coroner in an inquiry, touching the death of a person killed by the collision, is receivable in evidence in an action for damages, if the witness be shewn to be beyond the sea. *Ibid.*

11. A nautical witness cannot be asked, whether he thinks, having heard the evidence in the cause, that the conduct of the captain was correct or not. *Ibid.*

12. Evidence of a practice in contravention of a by-law is not receivable. *Ibid.*

13. The rule of the river is, that if a light vessel is going free, and a loaded vessel is coming close-hauled to the wind, it is the duty of the loaded vessel to keep her course, and of the vessel going free to bear away. *Ibid.*

SHOOTING.

See ATTEMPTING TO DISCHARGE LOADED ARMS.

1. Whether, on a count charging a shooting with intent to murder, it is essential that the jury should be satisfied that that intent existed in the mind of the prisoner at the time of the offence, or whether it is sufficient that it would have been a case of murder if death had ensued—*Quære*. But if it be necessary that the jury should be satified of the intent, the circumstance that it would have been a case of murder if death had ensued, would of itself be a good ground from which the jury might infer the intent, as every one must be taken to intend the necessary consequences of his own acts. *Regina* v. *Jones*, 258

2. A. was night-poaching in a wood belonging to B., and B. came up to A., and presented a pistol at him, saying, "Damn you, surrender;" A. said, "Now, don't you," and raised an air-gun, and discharged it, and wounded B. *Semble*, that if B. had died, it would not have been a case of murder. *Ibid.*

SHOP.

See LARCENY IN A SHOP.

SOLICITOR'S BILL.

See COMPANY, 4.

SPECIAL CONSTABLE.

If persons duly called upon by the magistrates to serve as special constables refuse to do so, the magistrates ought to cause them to be indicted. *Regina* v. *Vincent*, 91

2. A special constable duly appointed under the stat. 1 & 2 Will. 4, c. 41, is appointed for an indefinite time, and remains a constable till his services are either determined or suspended under the 9th section of that statute, and, being so appointed under that statute, he has all the authority of an ordinary constable until his services are either determined or suspended. *Regina* v. *Porter*, 778

STAMP.

See LANDLORD AND TENANT, 4.

1. A paper in the following form, signed by the party, "Memorandum, 30th April, 1836, Settled all accounts of law business up to this day, and will give a receipt in full of all demands when called for, (signed) J.T.;" stamped with an agreement stamp, is receivable in evidence without a receipt stamp. *Tebbutt* v. *Ambler*, 60

2. A promissory note was indorsed as follows;—" I hereby assign this draft, and all benefit of the money secured thereby, to J. G., of, &c., and order the within-named T. F. H. [the maker of the note] to pay him the amount thereof, and all interest in respect thereof. (Signed) H. O. R.:" —*Held*, that this indorsement did not require a stamp. *Richards* v. *Frankum*, 221

3. An I O U, which contains special terms that the sum to be paid shall be reduced in a certain event, and that part of the sum shall be disposed of in a particular manner, will require an agreement stamp, unless it relate to an amount under £20. *Evans* v. *Philpotts*, 270

STATUTE OF FRAUDS.

See GOODS SOLD.

STATUTE OF LIMITATIONS.

See LIMITATIONS.

STATUTE, PLEA BY.

See PLEADING, 2, 3.

STEAM-ENGINES USED IN MINES, DESTROYING.

See MINING-ENGINES.

STOLEN GOODS.

See MARKET OVERT.

SUBSCRIBING WITNESS.

See ATTESTATION.—WITNESS, 2, 3.

SUGAR.

The object of the legislature in passing the stat. 3 & 4 Will. 4, c. 58, was to insure that double-refined sugar should be *pure sugar:* and, though it says that the single-refined sugar from which it is made must be of a uniform whiteness throughout, that must be taken to mean of a uniform whiteness according to the subject-matter; and does not mean that every loaf or lump must be free from all discoloration. By that statute standard samples must be provided for the purpose of comparing double refined sugar with them; and these standard samples must be made from single-refined sugar of a uniform whiteness throughout, and double-refined sugar entered for the bounty, if it be not of a quality equal to the standard sample, may be seized:—But there is not, in point of law, any right to seize such sugar on account of a discoloration which prevents it from being of a uniform whiteness, if it be in fact equal in quality to the standard sample, and the discoloration does not arise from impurities. *Wackerbath* v. *Rich*, 699

SUICIDE.

A person cannot be tried for inciting another to commit suicide, although that other commit the suicide. *Regina* v. *Leddington*, 79

THREATENING TO ACCUSE, OBTAINING MONEY BY.

A. & B. were indicted for the offence of robbery. The jury found that A. took the property of the prosecutor from him by violence, and that B. was present during part of the time, and that he was a party with A. to a design to bring the prosecutor to the place where he was robbed by A., and to obtain property from him on a false charge of an unnatural crime, but that he was not aiding or assisting in or privy to the taking of the property from the prosecutor by violence:—*Held*, by all the Judges, that in order to convict B., the indictment should have been framed on the statute 1 Vict. c. 87, s. 4, and that he could not since the passing of that statute, under the circumstances of this case, be convicted on an indictment charging the offence of robbery. *Regina* v. *Henry*, 309

THREATENING TO LAY AN INFORMATION, OBTAINING MONEY BY.

A. threatened B. that he would inform against him for selling spirits without a license, unless B. would give him a sum of money. B. had not, in fact, sold any spirits; but he gave A. the money to prevent an information:—*Held*, that A. was indictable under the stat. 18 Eliz. c. 5, s. 4, although B. had not committed any offence, and although no information was ever preferred nor any process sued out. *Regina* v. *Best*, 368

TIME, REASONABLE.

See GUARANTEE.

TRADE, USAGE OF.

See AGENT'S COMMISSION.—AUCTIONEER'S COMMISSION.—BROKER'S COMMISSION.—CARPENTER.—COLLIERS.

TRAVERSE.

See POSTPONING TRIAL, 4, 5.

1. A. was indicted at the assizes for perjury; he had neither been in custody nor on bail. After the bill was found, A.'s counsel applied to have the case tried at the same assizes at which the bill was found. The counsel for the prosecution objected, and stated that no notice had been given by the defendant to the prosecutor of his intention to try at these assizes, except the present application:—*Held*, that the prosecutor could not be compelled to try at these assizes, and the case therefore stood over to the next assizes. *Regina* v. *Trenfield*, 284

2. If a person be indicted for a misdemeanor, and it be a different misdemeanor from that for which he has been committed or held to bail, he is entitled to traverse, although he has been committed or bailed more than twenty days. *Regina* v. *Howell*, 437

TREASON.

See CONSPIRACY.

1. To constitute the treason of levying war against her Majesty within the realm, there must be an insurrection, there must be force accompanying that insurrection, and it must be for an object of a general nature; and if a person act as the leader of an armed body who enter a town, and their object be neither to take the town nor attack the military, but merely to make a demonstration to the magistracy of the strength of their party, either to procure the liberation of certain prisoners convicted of some political offence, or to procure for those prisoners some mitigation of their punishment, this, though an aggravated misdemeanor, is not high treason. *Regina* v. *Frost*, 129

2. In a case of high treason the prisoner is not bound of necessity to shew what was the object or meaning of the acts done. The offence charged must be made out by those who make the charge. *Ibid.*

3. The court will not order that money taken from a prisoner charged with high treason be restored to him, unless it be made appear to the Court that the money forms no part of the proof against him. *Id.* 131

4. Counsel may be assigned for a prisoner charged with high treason upon an application made to the clerk of the Crown during an adjournment of the commission between the finding of the indictment and the arraignment, or the prisoner will be allowed, if he wishes it, to delay naming his counsel till he is brought up to be tried. *Id.* 132

5. Prisoners charged with high treason will be allowed copies of the depositions against them on the terms prescribed by the stat. 6 & 7 Will. 4, c. 114, s. 3. *Ibid.*

6. A person charged with high treason cannot be allowed by the Court

before which he is tried to have two attornies unless they be partners. *Ibid.*

7. The Court before whom a prisoner is charged with high treason will not order that papers taken from his house should be restored to him, neither will they order that he shall be furnished with copies of them. *Id.* 133

8. The only counsel in a case of high treason who are recognised by the Court are the two counsel who are assigned by the Court, and the Court will not take notice of any assistant counsel. *Id.* 134

9. In a case of treason where the prisoner's counsel asked that the names of the jurors should be taken from a ballot-box instead of being called over in the order in which they stood in the panel, which was alphabetical, and this proposition was acquiesced in by the Attorney-General, the Court allowed the names of the jurors to be taken from a ballot-box; but if the Attorney-General had objected, the Court would not have granted the application. *Id.* 135

10. The provisions of the stat. 6 Geo. 4, c. 50, s. 29, with respect to challenging of jurors by the Crown, is a mere re-enactment of the law on this subject as it was before the passing of that statute. *Id.* 136

11. The challenge of a juror, either by the Crown or by the prisoner, must be before the oath is commenced. The moment the oath has begun it is too late. The oath is begun by the juror taking the book, having been directed by the officer of the Court to do so; but if the juror takes the book without authority, neither party wishing to challenge is to be prejudiced thereby. *Id.* 137

12. In charging a jury with a prisoner in a case of high treason, it is not necessary to read the whole of the indictment at length to the jury, unless the prisoner or his counsel wish it; it is sufficient for the clerk of the Crown to state the substance of it. *Id.* 138

13. During a trial for high treason, which was expected to last several days, the Court ordered that the prisoner's attorney should have access to him every day after the rising of the Court till 10 p. m., and before the sitting of the Court from 7 a. m., although it was stated by the governor of the prison that the prison was not open for any other purpose till half-past 7 a. m., and was shut for the night at 9 p. m. *Ibid.*

14. In a case of high treason a witness was described in the list of witnesses as "S. S., of the parish of St. W., in the borough of N., in the county of M., labourer." N. was a place with 6,000 inhabitants, and formed only a part of the parish of St. W., which was a large parish extending beyond the borough of N.:—*Held*, sufficient, and that it was neither a misdescription nor too general. *Id.* 147

15. In a case of high treason or conspiracy the prosecutor may either prove the conspiracy which renders the acts of the co-conspirators admissible in evidence, or he may prove the acts of the different persons, and thus prove the conspiracy; therefore, in a case of high treason, where it appeared that a party met, which was joined by the prisoner on the next day, the counsel for the prosecution was allowed to ask what directions one of the party gave on the day of their meeting as to where they were to go, and for what purpose. *Id.* 149

16. On a trial for high treason a witness was described in the list of witnesses as "of Cross-y-Cylog, in the parish of L." The witness stated that he lived near Cross-y-Cylog, (which means Cross-of-the-Cock), and that there were two public-houses, each so called, and that his house was between them and sixty yards from each. It

was also proved that there was a cluster of houses at this place, and that a witness had directed invoices to one of them as Cross-y-Cylog:—*Held*, that the witness was not properly described. *Id.* 150

17. In a case of high treason a witness was described in the list of witnesses as "M. J., of P., in the parish of St. W., in the county of M., sometimes abiding at the house of his son J. J., in the parish of B., in the said county." The witness occupied a house at P., in the parish of St. W., in which his wife resided, he going to work with his son and returning to his house at P. about three days in every two months. The son's house was in the parish of M. and not in the parish of B.:—*Held*, that if the witness had been described as of P., in the parish of St. W., that would have been sufficient, but that, as the latter part of the description was incorrect, it vitiated the whole. *Id.* 151

18. In a case of high treason evidence had been given for the prosecution that an armed party attacked the W. hotel, in which the magistrates and troops were stationed. To shew that the intention of the party was not treasonable, but was merely to procure the release of certain prisoners, a witness was called to prove that on the party arriving at the hotel gate, they were asked by a special constable what they wanted, when one of them answered, "Surrender up your prisoners." It was proposed to call evidence in reply to shew that that was not said at the hotel gate:—*Held*, that this was properly evidence in reply. *Id.* 159

19. In a case of high treason, where the Crown gave evidence in reply, the witness in reply was called before the second counsel for the prisoner addressed the jury, and the leading counsel for the prisoner commented on the evidence in reply also before the second counsel for the prisoner addressed the jury. *Id.* 160

20. On a trial for high treason it was objected, after the jury had been charged with the prisoner, but before the first witness was examined, that the prisoner had had no list of witnesses delivered to him under the stat. 7 Anne, c. 21. It appeared that the indictment was found on the 11th of December, and that on the 12th of December a copy of it and of the panel of the jurors intended to be returned by the sheriff, were delivered to the prisoner, and that on the 17th of December the list of witnesses was delivered to him. The prisoner was arraigned on the 31st of December. The objection to the delivery of the list of witnesses was, that the copy of the indictment and the lists of jurors and witnesses should have been all delivered *at the same time simul et semel*:—*Held*, by a majority of the Judges, that the delivery of the list of witnesses was not a good delivery in point of law, but that the objection to the delivery of the list of witnesses was not made in due time, and the Judges agreed that if the objection had been made in due time, the effect of it would have been a postponement of the trial in order to give time for a proper delivery of the list. *Id.* 162

21. If, in a case of high treason, a point be reserved for the opinion of the fifteen Judges, their Lordships, if the point be argued, will only hear one counsel on each side; and as the counsel are in the nature of amici curiæ, their Lordships will hear counsel who were not assigned at the trial. *Id.* 165

22. If cases be reserved for two different prisoners on the same point, and both are argued, the Judges will hear each case quite separately, unless the counsel consent to some other arrangement. *Ibid.*

23. On a trial for high treason any objection to the description of the witness in the list of witnesses must be taken on the voire dire, and comes too late after the witness is sworn in chief. *Id.* 183

and are guilty of criminal negligence in not putting down any unlawful assembly, they are liable to be prosecuted for a breach of their duty. *Regina* v. *Neale*. 431

3. The mode of dispersing an unlawful assembly may be very different according to the circumstances attending it in each particular case; and an unlawful assembly may be so far verging towards a riot, that it may be the bounden duty of the magistrates to take immediate steps to disperse the assembly; and there may be cases where the magistrates will be bound to use force to disperse an unlawful assembly. *Ibid.*

USAGE OF TRADE.

See AGENT'S COMMISSION.—AUCTIONEER'S COMMISSION.—BROKER'S COMMISSION.—CARPENTER.—COLLIERS.

USE AND OCCUPATION.

See LANDLORD AND TENANT, 1, 2.

VARIANCE.

See AMENDMENT.—COIN, 2.

VENUE.

See PARISH.

At the Central Criminal Court, a person was indicted for a burglary in a house, which was stated in the indictment to be "at the parish of *W.*" The prosecutor stated that the correct name of the parish was *St. Mary W.* In the statute 4 & 5 Will. 4, c. 36, (the Central Criminal Court Act), s. 2, this parish is called "the parish of *W.*:"—*Held*, sufficient. *Regina* v. *St. John*, 40

VERDICT.

1. In an action against the owner of a brig for an injury done to a sloop belonging to the plaintiff, the amount of damage proved was upwards of £500—the jury gave a verdict for £250 only, and on being asked how they made up their verdict, replied that in their opinion there were faults on both sides:—*Held*, that notwithstanding this the plaintiff was entitled to the verdict, as there might be faults in the plaintiff to a certain extent, and yet not to such an extent as to prevent his recovering. *Raisin* v. *Mitchell*, 613

2. The plaintiff is to prove his case to the satisfaction of the jury; and if he leaves it doubtful either from the circumstances which surround it or from the character of his witness, the defendant is entitled to the verdict. *Long* v. *Hitchcock*, 619

WARRANTY.

See BEGIN, RIGHT TO, 6.

WILL.

See ATTESTATION, 2.—WILL, SECRETING.

WILL, SECRETING.

1. *Semble*, that in an indictment under the stat. 7 & 8 Geo. 4, c. 29, s. 22, for destroying or concealing a will for any fraudulent purpose, the purpose ought to be stated in the indictment. *Regina* v. *Morris*, 89

2. If a defendant concealed a will, and the money which ought, by the will, to have gone to A. and B., and with it paid the debts of the husband of the next of kin to whom he was a creditor, this would be a fraudulent purpose within the stat. 7 & 8 Geo. 4, c. 29, s. 21. *Ibid.*

WITNESS.

See ACCESSARY BEFORE THE FACT, 3.—EVIDENCE, 6.—SHERIFF, 1.—TREASON, 14, 16, 17, 23.

1. The calling of a witness, whose name is on the back of the indictment for the other side, to cross-examine, is by no means of course. It is discretionary even in felony, but it is a dis-

cretion always exercised, and it seems that the same discretion may well be exercised in misdemeanor. *Regina* v. *Vincent*, 91

2. A subscribing witness who resides in Dublin is out of the jurisdiction of the Courts of this country so as to let in proof of his handwriting, the same as if he were dead. *Doe* d. *Counsell* v. *Caperton*, 112

3. If, since the execution of a deed, the subscribing witness to it has become blind, a party suing on the deed must, if non est factum be pleaded, call the subscribing witness, and it is not enough to prove the handwriting of the parties executing the deed and of the subscribing witness. *Cronk* v. *Frith*, 197

4. A butcher sued three of the directors of a Zoological Society for goods supplied for the animals. For the defence a witness was called to prove that the plaintiff was a shareholder in the society. The witness was himself a shareholder, and had been released by one of the defendants:—*Held*, that the witness was not competent without being released by all the three defendants, but that he would be so, if released by all three defendants, without being released by the other shareholders. *Betts* v. *Jones*, 199

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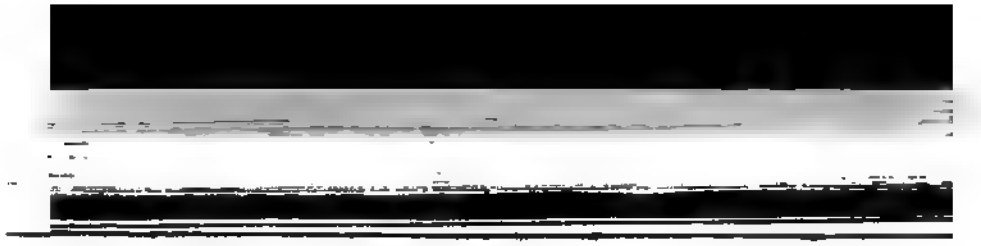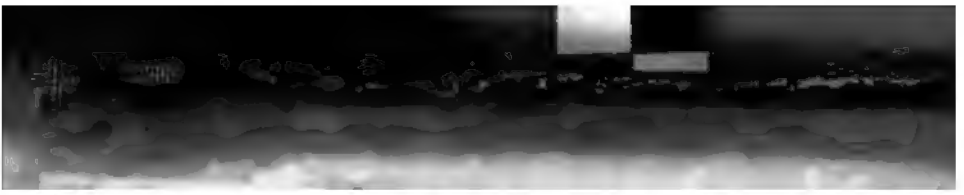
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